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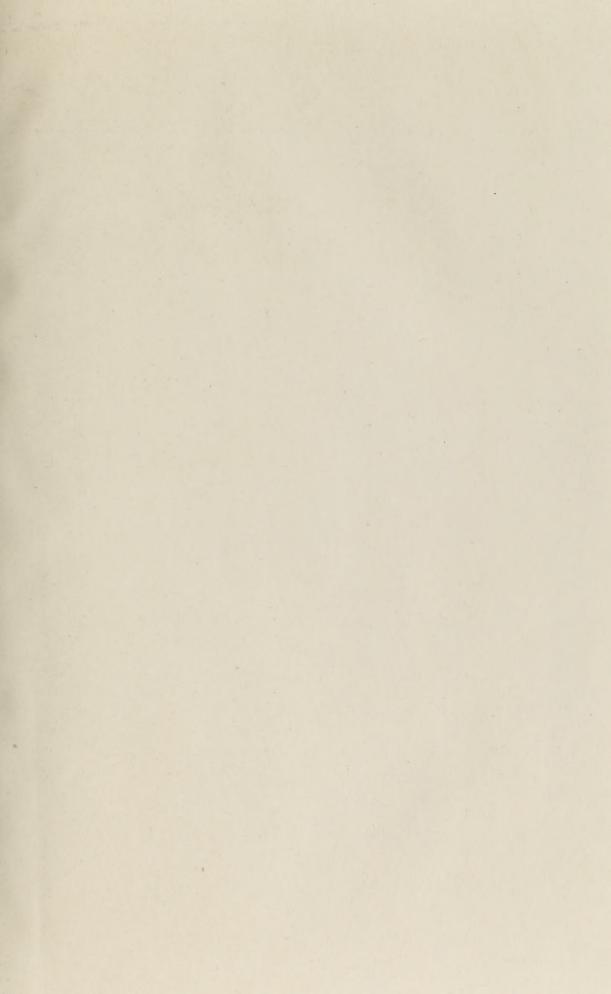
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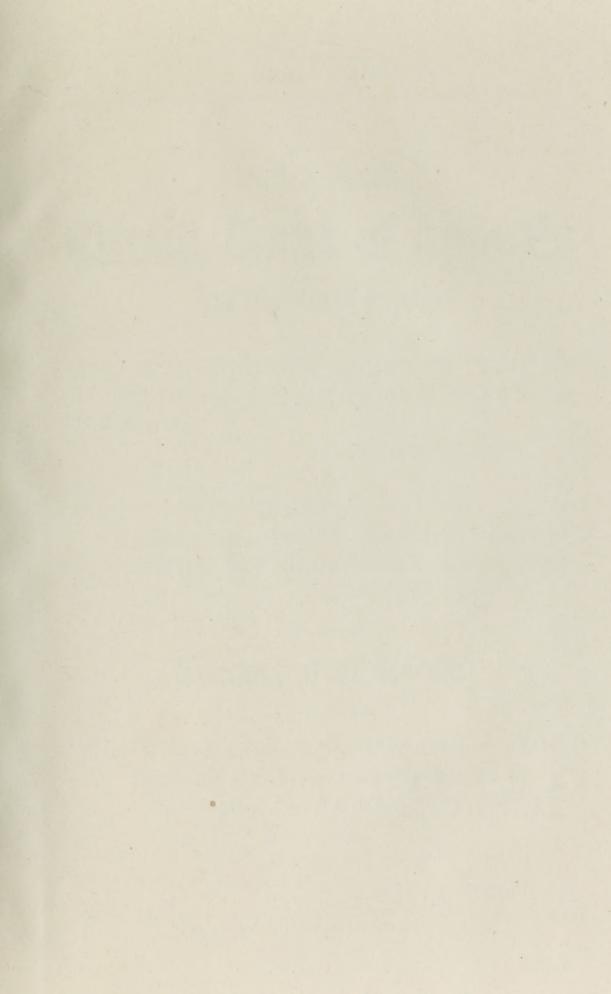
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## United States

# Circuit Court of Appeals

For the Ninth Circuit

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

Plaintiffs in Error.

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants in Error.

# Transcript of Record

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

JUL 25 1914

F. D. Monckton,



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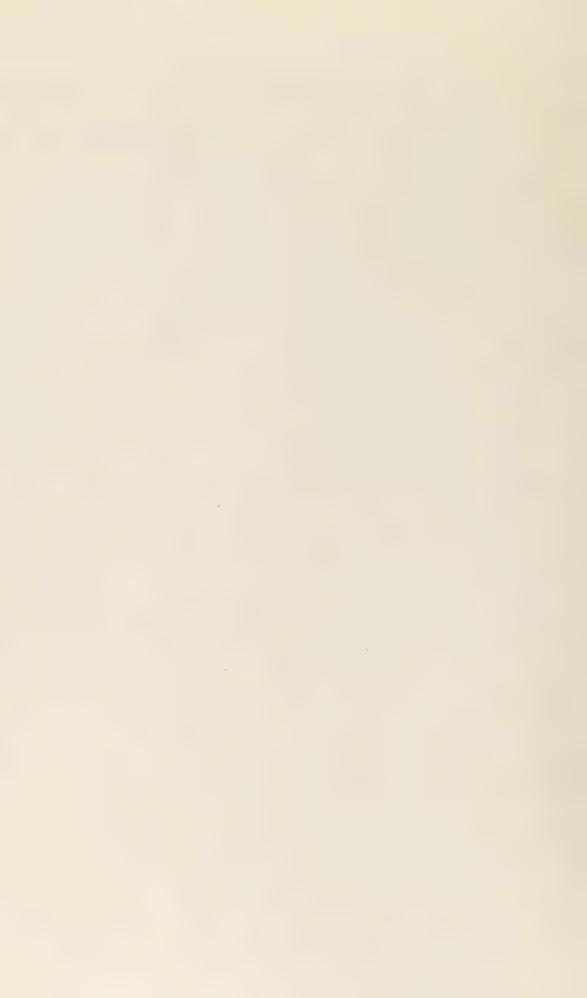
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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

Plaintiffs in Error,

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendants in Error.

#### Names and Addresses of Counsel.

H. H. A. HASTINGS, Esq., Attorney for Plaintiffs in Error.

64 Haller Block, Seattle, Washington.

- L. B. STEDMAN, Attorney for Plaintiffs in Error, 64 Haller Block, Seattle, Washington.
- JAMES B. HOWE, Esq., Attorney for Defendants in Error,

235 Pioneer Building, Seattle, Washington.

HUGH A. TAIT, Esq., Attorney for Defendants in Error.

235 Pioneer Building, Seattle, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division.

#### No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, Her Guardian,

Plaintiffs,

#### VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendants.

#### Amended Complaint.

Come now the above named plaintiffs, and, pursuant to the order of this Court, file this their amended complaint, and, for cause of action against the above named defendants, complain and allege:

#### T.

That Helen Dorothy Rininger is a minor of the age of thirteen years residing in King County, Washington, and that A. S. Kerry is her duly appointed and qualified guardian, having been so appointed by the Superior Court of King County, Washington.

#### II.

That at all the times herein mentioned, the Puget Sound Electric Railway and the Puget Sound Traction, Light & Power Company were, and still are, corporations organized and existing under the laws of the State of Washington, and own and maintain and are engaged in operating an electric passenger railway and its equipment between the Cities of Seattle and Tacoma, in the State of Washington.

III.

That there is an improved macadamized public highway and thoroughfare which crosses the tracks and road-bed of the defendants at Riverton about two miles south of Seattle, in King County, Washington; that at said highway crossing, said tracks run generally in a Northerly and Southerly direction, and that for about 2,000 feet, or more, North of said crossing and West of and adjacent and near to said tracks is a high, steep and continuous bluff, and that from a point about forty feet North of said highway crossing and for a distance of 800 or 900 feet from said point, the exact distance of which is not now known to these plaintiffs, defendants have excavated Westward and into said bluff and bank so that at a point 40 feet from said crossing the tracks and road-bed of defendants curve Westward and into said bank for several feet, which curve extends from the Westward toward said railway crossing on a descending grade of two or three per cent., and after it intersects said electric railway tracks it then turns abruptly Northward towards and leads into the City of Seattle; that the Duwamish River flows along and Eastward of said highway at and Northward from said railway crossing.

IV.

That said railroad bed and tracks were con-

structed and were and are operated and maintained in a careless and negligent manner in this: that defendants failed to excavate or remove an embankment of earth that extends and did extend on July 25, 1912, along the West side of said road-bed or right of way from a point 30 feet North of said highway crossing and extending continuously Northward and on a Westward curve for a distance of 800 or 900 feet, which embankment is sufficiently high that it completely obscures the vision and sight of persons approaching said railway crossing from the Westward on said highway, preventing them from seeing said railway tracks for about 1,000 feet North of said crossing; that said embankment could easily have been removed at small expense and when so removed there would then have been a clear view and vision to persons approaching said crossing from the Westward for a distance of 100 feet before reaching the same Northward over and across said tracks for a distance of 2,000 feet, so that persons proceeding Eastward upon said highway, and when within 100 feet of said crossing, could have readily seen an approaching car or train at any point within 2,000 feet Northerly from said crossing, which would give such persons ample time and opportunity to avoid being injured by approaching trains.

V.

That on July 25, 1912, between the hours of 4 o'clock and 5 o'clock in the afternoon, Edmund M. Rininger, the then husband of the plaintiff, Nellie M. Rininger, and father of the plaintiff, Helen Dor-

othy Rininger, was proceeding along said highway in a Northerly direction, riding in his own automobile, which automobile was operated by an employe of said Edmund M. Rininger, who was a skillful and careful and competent chauffeur, and as said parties reached the descending grade leading to said crossing at a point approximately 500 feet Westward from said crossing, they were proceeding at a speed of less than 20 miles per hour; that at said point the operator of said automobile shut off the engine that propelled said automobile and applied the brakes to the wheels thereof sufficiently to materially slacken its speed; that from said point above mentioned of about 500 feet Westward from said crossing said automobile coasted toward said crossing under complete control of said operator and at a reasonable rate of speed; that said highway from said crossing Westward for several miles was macadamized, and the wheels of said automobile were covered with pneumatic tires, and the engine of said automobile was at said time noiseless, not being operated, and that when said parties were within a reasonable distance Westward from said crossing, to-wit, 50 feet, both said Edmund M. Rininger and said operator of said automobile—being then in full possession of their senses of hearing and seeing and while proceeding at a slow rate of speed in said automobile to-wit, at about 12 miles per hour, which rate of speed was continued until they reached the crossing—listened and looked both Southward and Northward to ascertain if any cars or trains were ap-

proaching said crossing on said railway; that neither of them could hear any approaching car or trains on said tracks, and did not, and could not, see any cars or trains approaching from the North toward said crossing; that said parties could as easily have seen or heard an approaching car or train coming from the North on said tracks toward said crossing while so riding in said moving automobile, under the conditions as hereinabove described, as they could had they brought the automobile to a stand-still; that the manner in which said parties approached said railway crossing was reasonable, prudent and cautious and the methods and precaution that they adopted to ascertain if any cars or trains were approaching said crossing on said railway in either direction were reasonable, prudent and cautious; that when said parties in said automobile had reached within 20 feet of said crossing, they discovered for the first time an electric car approaching said crossing from the Northward, emerging from said curve at an excessively high and dangerous rate of speed, to-wit, 40 miles per hour; that the operators of said electric car had failed to sound the whistle or give any other warning of the approach of said car; that when said parties first discovered said approaching car, it was within 30 feet of said crossing; that the operator of said automobile then immediately applied the brakes to the wheels of said automobile and brought the same to a stop just as it reached the crossing; that the operators and motormen on said electric car did not slacken the high

and dangerous speed of said car as it approached said crossing; that said electric car collided with said automobile and with such force as to throw said Edmund M. Rininger out of it and against and under said electric car, where and at which time he was instantly killed.

#### VI.

That said highway was and is the principal thoroughfare from the South into the City of Seattle, and is a part of the Pacific highway, and was at said time much frequented and constantly used by the traveling public, and that said highway and railway crossing was then and had been for several years a dangerous crossing.

#### VII.

That prior to July 25, 1912, the dangerous character and conditions of said crossing were then well known to the defendants, and to their officers, agents and employees; that defendants did not, on July 26, 1912, keep or maintain any guard at said highway crossing to give warning to the public or to parties about to cross said tracks of the approach of cars or trains on said tracks.

#### VIII.

That at the time said Edmund M. Rininger was killed both he and the operator of said automobile were free from carelessness and negligence.

#### IX.

That the injuries and acts causing the death of said Edmund M. Rininger were wholly and entirely due to, and caused by, the carelessness and negli-

gence of the defendants in this: in the failure of defendants to excavate and remove the embankment of earth from the West side of the road-bed of defendants and North of the aforesaid highway and railway crossing, which embankment prevented persons approaching said crossing from the West from seeing or hearing approaching cars or trains on said tracks from the North; also in operating and running their cars and trains at, or approaching, that point at a rate of speed about 20 miles per hour, and particularly at any rate in excess of 30 miles per hour; and in failing to keep and maintain a watchman at said crossing to give reasonable warning to persons upon said highway about to cross said tracks of the approach of trains and cars thereon; that the dangerous conditions of said crossing were then well known to defendants; that said electric car was operated in a careless and negligent manner in this: that same was run at said point at an excessive and dangerous rate of speed to-wit, 40 miles an hour, and that the motorman thereon gave no warning by sounding of the whistle or otherwise of the approach of said car.

#### X.

That said Edmund M. Rininger was, at the time of his death, of the age of forty-two years; was in sound health and in complete possession of all of his faculties; was an exceptionally skilled and successful surgeon and physician with a large and lucrative surgical and medical practice in Seattle and the Pacific Northwest, and was earning in his

practice and business from \$60,000 to \$75,000 per annum.

#### XI.

That said Edmund M. Rininger was the sole support of the plaintiffs herein.

#### XII.

That plaintiffs have been damaged by the negligent acts and conduct of the defendants in causing the death of said Edmund M. Rininger, thereby depriving them of their means of support, in the sum of \$300,000, no part of which has been paid.

Wherefore, plaintiffs pray for judgment against defendants, and each of them, in the sum of \$300,-000, together with their costs and disbursements.

#### HASTINGS & STEDMAN,

Attorneys for Plaintiffs.

State of Washington, County of King.—ss.

Nellie M. Rininger, being first duly sworn, on her oath deposes and says:

That she is one of the plaintiffs in the above entitled cause; that she makes this verification for and on behalf of said plaintiffs; that she has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

#### NELLIE M. RININGER.

Subscribed and sworn to before me this 15th day of October, A. D. 1913.

#### H. H. A. HASTINGS,

Notary Public in and for the State of Washington, residing at Seattle.

Service of the within Amended Complaint by delivery of a copy to the undersigned is hereby acknowledged this 15th day of October, 1913.

JAMES B. HOWE, HUGH A. TAIT,

Attorneys for Defendant.

Indorsed: Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 15, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, Her Guardian,

Plaintiffs.

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

#### Separate Answer of Puget Sound Electric Railway.

Comes now the defendant Puget Sound Electric Railway and for its separate answer to the amended complaint of the plaintiffs in the above entitled action, admits, denies and alleges as follows:

I.

This defendant denies any knowledge or infor-

mation sufficient to form a belief as to any of the allegations contained in paragraph one of said amended complaint.

#### II.

This defendant denies each and every allegation contained in paragraph two of said amended complaint, except that this defendant admits that it owns and maintains and is engaged in operating an electric passenger railway and its equipment between the cities of Seattle and Tacoma, in the State of Washington.

#### III.

This defendant denies each and every allegation contained in paragraph three of said amended complaint, except that this defendant admits that there is a public highway and thoroughfare which crosses the tracks and roadbed of this defendant at Riverton, in King County, Washington, and except that this defendant admits that at said highway crossing said tracks run generally in a northerly and southerly direction, and except that this defendant admits that north of said crossing and west of and adjacent and near to said tracks is a high, steep and continuous bluff, and except that this defandant admits that said highway extends from the westward toward said railway crossing on a descending grade and after it intersects said electric railway tracks it then turns northward towards and leads into the City of Seattle, and except that this defendant admits that the Duwamish River flows along and eastward of said highway at and northward from said railway crossing.

#### IV.

This defendant denies each and every allegation contained in paragraph four of said amended complaint.

#### V.

This defendant denies each and every allegation contained in paragraph five of said amended complaint, except that this defendant admits that on July 25, 1912, in the afternoon, Edmund M. Rininger, the then husband of the plaintiff Nellie M. Rininger and father of the plaintiff Helen Dorothy Rininger, was proceeding along said highway, riding in his own automobile, which automobile was operated by an employe of said Edmund M. Rininger, and except that this defendant admits that both said Edmund M. Rininger and said operator of said automobile were then in full possession of their senses of hearing and seeing, and except that this defendant admits that one of its electric cars and said automobile collided, as the result of which collision said Edmund M. Rininger was then and there killed.

#### VI.

This defendant denies each and every allegation contained in paragraph six of said amended complaint, except that this defendant admits that said highway was and is a thoroughfare from the south into the City of Seattle and was at said times used by the travelling public.

#### VII.

This defendant denies each and every allegation contained in paragraph seven of said amended complaint.

#### VIII.

This defendant denies each and every allegation contained in paragraph eight of said amended complaint.

#### IX.

This defendant denies each and every allegation contained in paragraph nine of said amended complaint.

#### X.

Referring to paragraph ten of said amended complaint, this defendant denies any knowledge or information sufficient to form a belief as to whether or not said Edmund M. Rininger was, at the time of his death, of the age of forty-two years, or as to whether or not he was in sound health or in complete possession of all of his faculties; and this defendant denies each and every other allegation in said paragraph contained.

#### XI.

Referring to paragraph eleven of said amended complaint, this defendant denies any knowledge or information sufficient to form a belief as to any of the allegations therein contained.

#### XII.

This defendant denies each and every allegation contained in paragraph twelve of said amended complaint, except that this defendant admits that no part of the sum of three hundred thousand dollars (\$300,000) therein referred to has been paid, and denies that the plaintiffs, or either of them, have been damaged in the sum of three hundred thousand dollars (\$300,000), or in any other sum or amount whatsoever, or at all.

Further answering, and as a further, separate and affirmative defense, this defendant alleges:

I.

That all the physical injuries sustained by said Edmund M. Rininger, deceased, and all the injuries and damages sustained by the plaintiffs, or either of them, and which are set forth and alleged in their amended complaint, if any injuries or damages said plaintiffs, or either of them, have sustained, occurred and were caused by the fault, carelessness and negligence of said Edmund M. Rininger, deceased, and the fault, carelessness and negligence of his servant and chauffeur, and the said fault, carelessness and negligence of said Edmund M. Rininger, deceased, and of his said servant and chauffeur contributed thereto and were the proximate cause thereof.

Wherefore, having fully answered, this defendant prays that this action be dismissed; that it go hence without day, and have and recover of and from the plaintiffs its costs of suit herein.

> JAMES B. HOWE, HUGH A TAIT,

Attorneys for Defendant Puget Sound Electric Railway.

State of Washington, County of Pierce.—ss.

Louis H. Bean, being duly sworn, on oath deposes and says that he is the Managing Agent of Puget Sound Electric Railway, a corporation, one of the defendants in the above entitled action; that affiant has read the foregoing answer, knows the contents thereof, and believes the same to be true; that he makes this verification because said defendant is a corporation and affiant is its Managing Agent.

#### LOUIS H. BEAN.

Subscribed and sworn to before me this 21st day of October, 1913.

#### WINIFRED FISH.

Notary Public in and for the State of Washington, residing at Tacoma, in said state.

(Notarial Seal)

Copy of within Answer received this 21st day of October, 1913.

## HASTINGS & STEDMAN,

Attorneys for Plaintiff.

Indorsed: Separate Answer of Puget Sound Electric Railway. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, Her Guardian.

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

### Reply to Affirmative Defense.

Come now the plaintiffs in the above entitled cause and for reply to the affirmative defense of the Puget Sound Electric Railway, allege:

I.

Replying to each and all of the allegations and averments of the first paragraph of said affirmative defense, these plaintiffs deny each, every and all of said allegations.

Wherefore these plaintiffs pray for judgment as asked for in the amended complaint.

HASTINGS & STEDMAN.
Attorneys for the Plaintiffs.

State of Washington, County of King.—ss.

Nellie M. Rininger, being first duly sworn on oath, deposes and says: that she is one of the plain-

tiffs in the above entitled cause, that she has read the foregoing reply, knows the contents thereof and believes the same to be true.

#### NELLIE M. RININGER.

Sworn to before me and subscribed in my presence this 25th day of October, 1913.

(Seal) H. H. A. HASTINGS,

Notary Public in and for the State of Washington, residing at Seattle.

Copy of within Reply received and due service of same acknowledged this 27th day of October, 1913.

### JAMES B. HOWE, HUGH A. TAIT,

Attorneys for Defendant, Puget Sound Elec. Ry.

Indorsed: Reply to Affirmative Defense. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 27, 1913. Frank L. Crosby, Clerk. B. O. W., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER, et al.,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

#### Trial.

#### Empaneling of Jury.

Now on this day this cause comes on regularly for trial in open Court, the Plaintiff being represented by Messrs. Hastings & Stedman, and the Defendants represented by Hugh A. Tait, a jury being called come and answer to their names as follows: Hugh Allen, James McEvily, J. E. Guindon, R. T. Noyes, C. I. Chamberlain, Carl F. Nelson, C. H. Hicks, Chas. Gardner, O. D. Joanis, John F. Cronen, Abbie McKilligan and James M. Baily, twelve good and lawful men duly empaneled and sworn, the trial proceeds by statement of counsel to jury.

And now the hour of adjournment having arrived, by consent of parties it is ordered by the Court that this cause be, and is hereby continued until Friday, February 13, 1914, at 10:00 a.m., and the Court having cautioned the jury they are allowed to separate until that hour.

Dated Wednesday, February 11, 1914. Journal 3, Page 448. In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, Her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

### Plaintiffs' Draft of Proposed Bill of Exceptions.

Be it remembered that this cause came on regularly for hearing on February 11, 1914, before the Hon. E. E. Cushman, judge presiding, plaintiffs appearing by their counsel, Hastings & Stedman, and defendants appearing by their counsel, J. B. Howe and Hugh A. Tait. The following proceedings were then had. A jury was empaneled and sworn according to law, and thereupon plaintiffs, to sustain the issues upon their part, offered the following testimony as their evidence in chief:

## Testimony of Walter P. Miller, Witness for Plaintiff.

"My name is Walter P. Miller. I am a photographer, having followed that occupation for the last 15 or 16 years, and was such in July and August, 1912. On August 8, 1912, I took some photograph views of the locality at what is known as the River-

ton Crossing, where the county highway crosses the tracks of the Puget Sound Electric Railway Company, and Mr. Brodnix, the chauffeur who was driving the machine at the time of the Rininger accident, was with me." (Witness was shown a photograph.) "I took this photograph, and it is a correct representation of the conditions as shown thereon. At the time this picture was taken the camera which took it was in the center of the road about 200 feet West of the Interurban tracks at the Riverton Crossing." (This photograph was identified as Exhibit No. 1.) (Witness was shown another photograph.) "I took this photograph which correctly shows the condition that appears thereon, and it is a correct representation of the objects which are shown therein." (This photograph marked for identification, Plaintiffs' Exhibit No. 2.) "At the time this picture was taken, the camera that took it was about 20 feet West of the Interurban track, and shows the locality looking in a Northerly or Northwesterly direction from the camera. These photographs were taken August 8, 1912." Mr. Hastings: "I suppose we will have to supplement this with some additional proof to show that the conditions on the 8th of August were the same as on the date of the accident." Mr. Tait: "I have no objection to these pictures. I think they are correct representations." Thereupon plaintiffs' exhibits 1 and 2 were offered and received in evidence. Witness continued: "Again referring to Exhibit 2, it purports to show the Interurban crossing of the road at Riverton and

shows the tracks of the defendant looking North, I think, and near the front part of the picture appears a post with a sign on top of it. It has a railroad crossing sign with lights and the bell on it. bell gives an alarm that rings if a train was passing." The photographs were then submitted to the jury for examination, it having been agreed that the photographer might write on the back of each the point where he took them, because it would be difficult to remember the exact location of each. Thereupon another photograph was shown to the witness, and he continued: "This is one of the pictures which I took on the same date and is a correct representation of what it purports to show. At the time it was taken the camera was in the center of the road about 40 feet West of the Interurban track and pointing East." Thereupon this photograph was marked "Plaintiffs' Exhibit No. 3," and received in evidence without objection. It was thereupon agreed that the several photographs, about to be offered by plaintiffs, shall be received in evidence without objection except that the witness on the stand should state the points from which they were taken, and to make endorsements on the back of each to show such location. Thereupon another photograph was shown to the witness, whose testimony continued as follows: "This is one of a series which I took at that time and the camera was situated 10 feet from the track looking in a Northeasterly direction." Thereupon this photograph was received in evidence without objection as "Plaintiffs' Exhibit No. 4," and

another photograph was shown to the witness, who testified as follows: "This is another one of the photographs taken at the same time and the camera was 20 feet from the track looking in a Northeasterly direction." This photograph received in evidence without objection, marked 'Plaintiffs' Exhibit No. 5," and another photograph shown to the witness, who testified as follows: "This is another photograph taken by me at the time, and the camera was situated 30 feet from the track looking in a Northeasterly direction." This photograph was received in evidence without objection, marked "Plaintiffs' Exhibit No. 6," and another photograph was shown to the witness, who testified: "This is another photograph taken by me at the time and the camera was situated 50 feet from the track looking in a Northeasterly direction." This photograph received in evidence without objection and marked "Plaintiffs' Exhibit No. 7," and another photograph shown to the witness who testified: "This is another photograph taken by me at the same time and the camera was situated 60 feet from the track looking in a Northeasterly direction." This photograph was received in evidence without objection, marked "Plaintiffs' Exhibit No. 8," and another photograph shown to the witness who testified: "This is another photograph taken by me at the same time, and the camera was situated 60 feet from the track looking more in an Easterly direction. All of these photographs correctly show the conditions that appear thereon." This last photograph received in evidence

without objection, marked "Plaintiffs' Exhibit No. 9."

#### Cross-Examination.

"In describing the different distances from the track that my camera was standing at the time these photographs were taken, I refer to the Westerly or South bound track and the West rail of the West track, there being a double track at that crossing, and the distances given by me are from the West rail of the West track, and the West track over which the trains from Seattle to Tacoma pass."

## Albro Gardner, Jr., Witness for Plaintiffs.

"My name is Albro Gardner, Jr. Am a civil engineer, which occupation I have followed since 1893, and am practicing my profession in Seattle, where I have resided since 1883. I am familiar with the locality known as the Riverton Crossing, where the public highway crosses the tracks of the defendant, Puget Sound Electric Railway Company, out South of the City of Seattle, being as familiar therewith as one would be, traveling backwards and forwards very often, and have been familiar with the locality since 1903. I have recently made a plat or drawing of the locality, which plat is a survey that we made showing the location of the crossing on January 12, 1914, about a month ago, and this plat correctly shows the location of the tracks of the Puget Sound Electric Railway Company as it crosses the highway at Riverton, and also shows the location of the several objects that appear thereon, and so far as I am

able to observe the conditions surrounding this crossing in January, 1914, were similar to what they were in July, 1912. There were two of us who did the work of making the actual measurements on the ground, and I was doing part of it and I participated in the preparation of this drawing." (Drawing or plat received in evidence without exception and marked "Plaintiffs' Exhibit No. 10.") Mr. Tait: "You made the drawing from the notes which you took yourself on the ground?" "A. Yes, sir. Q. You actually made this drawing from your own notes? A. Yes." Continuing his direct examination, witness states: "The general direction of the tracks on this map are practically North and South. There is an arrow marked on Exhibit 10 which indicates the directions, and this arrow points North and South." (Witness marks the points of the compass with a red pencil on the map.) "The reddish shade in the middle of the road indicates the part of the county road that is macadamized and this macadam extends South of the crossing, and I think it goes to Renton Junction in that direction somewhere, and I have been familiar with this highway since 1903, and it is the main thoroughfare leading out from the South part of the City of Seattle. I know about the volume of traffic that passes over it and did during the month of July, 1912, and it carries a lot of traffic because most everything that goes between here and Tacoma or in the Valley travels this road. I refer to the Duwamish Valley between here and Tacoma. There are several towns in the Valley.

There is a small settlement to the Southwest of that locality called Riverton, and there are other settlements farther South. Tukwila first, and Renton, Kent and Auburn farther South. There is practically no other thoroughfare leading South from the city that passes out through that territory through this Valley. The elevations of different objects and portions of the territory are shown on this map. We assume as datum an elevation at the crossing of the county road and the Puget Sound Electric Railway Company's track as 100 feet and run everything to that. On the map along the highway is a place marked "store and platform," which is Southwest from the crossing. The ground breaks off to the South of the county road and the platform is open underneath, but the basement is under the store. At a point about 50 feet West of the West rail along the center of the road, it is about two feet higher than the track. This map is drawn to a scale of one inch to 30 feet. We took another elevation which is farther West, and this is 12.1 feet above the track. This point is about 300 feet West of the track giving about a 4 per cent grade, and makes an average of a 4 per cent grade on the highway. It is practically a continuous grade from the store to the crossing. It is a little steeper just before you get there, but it is a water-bound macadam and the grade is not as even as the newer macadam roads now made. The macadamized portion of the road at that point is from 13 to 14 feet wide. On this map appears the word "plat-form" on the tracks a

little North of the highway. This is a plat-form upon which the passengers alight from the Southbound car. There are no buildings or anything else there besides this plat-form. On the map we have marked "alarm bell," which is an iron post there with a gong and a danger signal on it. This gong is operated from the third rail just about 1220 feet North of the crossing, and the shoe on the out-bound cars will hit the third rail and start the gong to ringing. Out-bound cars go in a South direction. I will mark on the map, this appliance that sets the gong in motion, with a letter 'A' in red, which point is 1220 feet North of the gong. This appliance also manipulates a series of lights on the same postsmall incandescent colored lights, which can be seen when lighted. I think these lights are operated by the same switch and device that operates the gong. This post carrying this gong is about 17 feet from the macadam portion of the highway, and I do not know whether a traveler passing over the highway toward the crossing could see it or not until he got fairly close to it. There is a line running North along the West side of the tracks which indicates a fence and the balance the top of a steep bank. I will describe the conditions West of the track or a distance of 1,200 feet North of the highway crossing. Starting in at the point 'B' it is practically on the level with the county road. The fence is about 5 feet high. I think it shows on the picture. I only show it part of the way up the hill. There is a road just to the West of that which goes to the Northwest

and at a point about 50 feet from the green fence it is 18.6 feet above the track. At a point 120 feet it is 20.8 feet." Question by juror: "What is this that is above the track that he is speaking of?" A. "This is the top of the steep bank caused by the excavation of the right of way for the car-line."

Continuing, the witness states: "The steep bank is on the left hand side going North, the right hand side going out. I might explain here, this is the county road, and here is the crossing at Riverton where the accident happened, and this is the platform for the people to get on coming in. The letter 'P' is the platform for the people to get on and off on the Northbound cars. The letter 'Q' is the platform for the people to get on and off on the southbound cars. The portion colored in red is the waterbound macadam road, and the portion marked 'plank roadway' is the continuation of the county road to the river and bridge, and it extends a little North to the graveled road, which extends along the East side of the electric tracks. At the point marked 'X,' the main thoroughfare crosses the bridge and goes to the East side of the Duwamish River and East on into town. This to the North shown in red is a graveled road and only a local proposition. does not lead directly into the city. The plank roadway is the ordinary county plank road and bridge on some kind of frame work. I did not examine whether it was piles or post. I think a portion of the West edge is over on the ground, but the East edge is up in the air because it is near the river.

There is a board fence made out of 1x12 boards spiked to some kind of railing close together between the plank roadway and the tracks of the interurban. These bards are perpendicular and make a tight fence about 5 feet high. A part of the county road and the tracks are practically on a level and then just to the West of it is a steep bank extending very steep like this, all along here. It goes to nothing at the point marked 'B.' At the point marked 'C' it is about 440 feet North of 'B.' The top of the bank at this point is 44 feet high above the car tracks and continues along with a decreasing height as it goes North. The East end of the platform where it is marked on the plat 'store and platform' is about 60 feet from the West rail of the West track. The river bank opposite the crossing is about 100 feet from the macadamized road just on the curve, and as you go North where the two start to parallel they are from 40 to 45 feet. There appears on the map and drawing right North of the highway and across the track at a point where I now mark with the letter 'D" what is called the cattle guard or cow-catcher. This cattle-guard represented by the letter 'D' North of the macadamized road is about 25 feet. There is also a cattle-guard on the South side about 30 feet." Q. "I will ask you to state what effect, if any, does this bank between the point marked '120 feet' and the point marked 'B' have upon a view of the tracks of the defendant North of the crossing?" A. "Well, including the fence, which is a 1x6 board fence about 5½ feet

high and the bank and the ferns and weeds that grow in there, it practically obstructs it for that The height, right at the crown, height. would be as high as a man's head, and then as you go farther here, at a point about 70 feet from 'B' along the fence Northeasterly it would be about 18 -about 24 feet above the track—the top of the fence. When I was out there surveying in January, I made observations respecting the Southbound cars of the defendant on the West track. While we were there working there were a number of them passed through. We noted the height that a man would be. We noted the men's heads in a couple of automboiles as they passed by and we wanted to take some pictures, so we got a focus from the store and stood in the street here and our heads were just about the height of the men's heads in the automobiles, so then we took our pictures and observations from a point marked 'M.' Now from 'M' when a car is coming along the West track after it passes the point marked 'T,' it practically disappears from view until it comes nearly to the platform marked 'Q.' The point 'M' is about 90 feet from the West rail of the West track, and as you stand here at the point 'M' you will see the car as it is coming along on the West track South-bound until it comes to about 'T,' and then at 'T' are these poles along here, and the fence and the banks obstruct the car and you won't see it again until it is in here again right close. While we were observing this action, we took some photographs of an approaching train. These

are the two photographs which we took at that point on January 12, 1914. On that day it was raining a little bit, and for that reason the pictures were not as clear as they would have been on a clear day. These photographs were taken at a point just West of the platform at the point marked 'M' on the plat and the camera was 5 or  $5\frac{1}{2}$  feet above the ground which was about the height that a man's head would be in riding in an automobile. At the time these photographs were taken, the car had passed the Allen-Town platform." Thereupon, the two photographs identified by the witness were received in evidence without objection, marked "Plaintiffs' Exhibits 11 and 12."

#### Cross-Examination.

"Referring to the two photographs, 'Plaintiffs' Exhibits 11 and 12,' I did not snap the camera which belongs to our firm. At the time the pictures were taken, the cars were running along the Southbound track. Just the front of the car shows in the picture. It is just disappearing right there (showing). Am looking at Exhibit 11. The train is opposite the pole 5, which would be on the other track. is pole 5, and the car was right there." Q. "But you cannot see that in the photograph owing to the fact that the day was a dark, cloudy, rainy day, is that the reason?" A. "No, sir. It is not. If you will notice that is the one where it is just disappearing behind that pole." Q. "In this photograph, exhibit 11, when that picture was taken, could you see any part of the approaching car?" A. "No, sir, it

was just disappearing." (Continuing.) "I knew where the car was when we took the picture because I had one of the men go up here and mark exactly when we held up our hands where we wanted the photograph taken. Here he marked where the car was. This was pole 5 and the other is at this point marked 'T.' Exhibit 12 shows the car at point 'T.' and it is about 48 feet from the point 5 to the point 'T.' If it had been a clear day and the sun bright, you could have seen the car shown in pictures 11 and 12, but indistinctly. Where it is North of pole 5, you see a little shade down there behind just disappearing behind the pole. If it had been a clear day, the car would not have been more distinct in Exhibit 12 than it is in 11, because it hadn't disappeared yet. In taking Exhibit 12, the photographer had he happened to be standing at the place where this picture was taken, could have seen the train just as it was disappearing. It so shows in the picture. The camera was standing at the point marked 'M' at the time both pictures were taken, and this point 'M' is 90 feet West from the West rail of the Southbound track in the center of the road. I never measured the height of an ordinary interurban passenger car, and do not know its height." Q. "Did you make any other observation to ascertain the greatest distance West from the Southbound track that a person could stand and see a Southbound car coming all the way from Allentown down to this crossing?" A. "Well, I can explain it this way. I walked clear up to the point marked 'J' and I watched or looked for

a car down toward the Allentown bridge, which is at the point marked 'X.' I don't think I noticed a car when I was at this point, but when we got farther East along the road you might see one in here, but as soon as it passes along behind the big bluff then it goes in a pocket and you don't see it as you near the track. There is no point West of the point 'M' that it is possible to see the Southbound train coming all around the curve. The point 'M' is 90 feet from the Southbound track and you cannot see the train after it passes point 'T' until it reaches nearly the platform at 'Q.' Somewhere between Point 'M' and the track you could see a train coming all around the curve, but I do not know at what point, as I did not investigate that, but it would be a point very close to the tracks. On the plat are a lot of black dots marked 'poles.' These dots are not put on at random, but are put on from actual surveys and the distance between these poles on the West side of the Southbound track is about 200 feet between the first and second, about 180 feet between the next two, about 180 feet between the next two, and about 180 feet between the next two. I do not know that these poles are about 100 feet apart. This is the way we measured. We did not measure each pole that way because we did that all with the transit. A stadium is when we take the transit and the rod and measure the distances with stadium measures and measured along the county road here to check them up opposite the posts. We did not take any measures right along the tracks. We did not

make any actual measures with the tape or measure because we did not have to do it to get the distances. When this plat was made, we did not know where the Westerly line of the company's right of way runs and we could not say whether the top of this bank is inside or outside of the company's right of way except that at the point 'C' the company's men were working. There were a number of large logs that were just about to tumble down on the cut on the track, and they were taking them back up the bank. I could not see where the company's right of way runs along there, and this line which we have drawn consisting of dashes, indicated by the word 'bank' represents the top of the bluff on the Westerly side of the track and that bank is as much above the level of the tracks as the figures indicate, and where the figures are 134.8, between the figures marked in red 13 and 14, means that the point is 34.8 feet above the crossing as we assume that the crossing was at an elevation of 100 feet, and everything has reference to the elevation of the crossing and at the point 'C,' which is the highest point, it would be 44 feet immediately West of that also. The distance of the point opposite 'C' from the top of the bluff to the Westerly rail of the Southbound track is about 50 feet, which is about as great as any distance along there. That is above the macadam the highest point. South of this dotted line, consisting of dashes, at a point indicated by 'X' is the fence that starts from the edge of the county road and follows along between the line and the right of way, as I take it,

of the Puget Sound Electric Railway Company. Just for a short distance there is a county road or public highway of some sort running in a Northerly direction parallel with these tracks and then it turns West. I cannot say, I am not sure, how far from this platform marked 'Q' does the county road run Northerly, but I think it turns at about the point marked 120.8, which would be about 120 feet from the point 'B,' and the distance from the Easterly margin of that public road to the Westerly rail of the Southbound track is about 33 to 34 feet. It looks on an average to be about 30 feet, and this county road runs parallel with the track on the Westerly side and intersects the main traveled road, but I don't know whether you could call it a county road. It is some kind of a public road that comes right down to the point just West of the tracks. This bluff begins to slope upward at about the South end of this platform on the North side of the highway. You see my elevation was a foot and a half above the car track at the corner of the fence so that it just starts from there. It is practically level and then it starts up, and when it comes to the height of about 20 feet from the level of the railroad at a distance back from the crossing, it is about 150 feet. That is, about 150 feet back of that, the bluff is 20 feet high and the fence is still above that. In that portion of the highway crossing the tracks which is indicated by a red pencil mark, appears the figures 5 per cent, which means that there is a rise of a foot and 9-10 from the track to this point, and that

means a 5 per cent grade. The most of the road is a 4 per cent grade except for that little piece right there. As I testified before, the average is about 4 per cent. This 5 per cent grade extends about 45 feet South of the crossing." Q. "Now, you were down there not long ago and you say you are familiar with that; now is it not a fact that as you approach the railroad crossing from the Westerly side coming in towards Seattle, that just before you get to the tracks, and for a distance back of about 20 feet that that road flatens out and is almost level for 20 feet?" A. "Just a little piece right near the tracks." Q. "Just before you strike the tracks as you are driving towards the track in a Northerly direction, the road does flatten out and is almost level?" A. "It is less than a 4 per cent, yes." Q. "Is it not almost level; is it not substantially level?" A. "4 per cent is substantially level. When it is only one foot in 25 that is pretty near level." Q. "That substantially flattened out portion extends back from the Southbound track about how many feet—20 feet or something like that?" A. "Well, I don't remember that it flattened very much, because if it had been very much of a break I would have noted it on the plat." Q. "Is it not true that as the road actually reaches the West rail that there is a slight upward inclination?" A. "Not to my recollection." Q. "Now in speaking of a 4 per cent grade and a 5 per cent grade, you mean four feet or five feet rise in every 100 feet, don't you?" A. "Yes." (Continuing.) "I am somewhat familiar

with the percentage of the grades on the down town streets in the business district. I do not recall a 4 per cent grade off-hand, but a 5 per cent grade is between Pike and Pine on Second and between Pike and Stewart on Second in Seattle, Wash. That is about a 5 per cent grade. The electrical alarm danger post spoken of I think I testified was about 17 feet from the county road and about 10 feet from the West rail of the West track, and is located on the North side of the county road and the West side of the railroad tracks. I should say this post was 8 or 9 feet high. I did not measure it. I did not count the number of electric lights on the top of it. There is something like 4 or 5 or a half dozen, and there was also two large crossboards which says "Railroad crossing" on it. I did not measure the size of these boards. They are the ordinary railroad crossing. I would say they were 4 or 5 feet long and my recollection is 6 or 8 inches wide, and they are painted white and the lettering on them is black. This pole is shown on the plat and is marked "alarm pole," and is accurately located on this plat (Exhibit 10) with reference to the tracks and to the county road. There is nothing to obstruct one's view of it coming right straight down except as you come around the curve here; you come around a slightly descending grade and the grade increases as you come near the railroad track. The extreme distance shown on the map to the South of the railroad track is about 380 feet. It is about 300 feet to the South end of the 4 per cent grade and from there on it is

2 per cent." "Q. "Back here at the South end of the 4 per cent grade, is there anything to prevent a traveler coming toward the track from seeing the danger signal and that electrical pole? Can't you see it right down there according to your own drawing? A. Yes, sir, you can see it right down the road. (Witness was handed Exhibit 1 and continued): "I recognize the locality shown in that picture. I also recognize the electrical pole and the danger signal. I think this picture is a correct representation of the situation, and that is the danger signal right there in it. I have heretofore testified about some small settlements in that locality among which was Riverton. It is not very thickly settled. The houses are scattered out. It is cut up into small acreage within, say, two or three hundred yards. I imagine there are 8 or 10, something like that, houses practically about that, within 200 or 300 yards of the crossing to the South and West. There is nothing which you would really call a town. Tukwila is something like a mile or two from Riverton. From Riverton to Kent or Auburn it must be 10 or 15 miles." Q. "But right at the crossing, at the Riverton crossing, you would call that a country district in through there, would you not? A. Well, it is pretty thickly settled for an ordinary country district. As I said before, it is cut up to the South and West of the track—in fact on both sides of the county road, it is cut up into small tracts and sold off in small garden tracts. Q. Acreage tracts, or something like that? A. Yes, sir. Q. Not over

two or three hundred people living within a quarter of a mile of that crossing, are there? A. I suppose somewheres along there."

#### Redirect Examination.

"It is practically all settled and a continuous settlement from the city limits along this main thoroughfare for a distance of 4 or 5 miles from the South boundary of the city. There is a small village between Riverton and Tukwila called Foster. I have been familiar with this thoroughfare since 1903, and my familiarity is based on traveling backwards and forwards on the Interurban and on the county road whenever I have had occasion to go that way, which has been frequent, and my business takes me out into the districts outside of the city frequently. We are surveying in all parts of the county and have been since 1903." Q. "Now, from such familiarity with that highway at that crossing, can you give any expression as to the amount of traffic that passed over that crossing during the year 1912? A. Well, not in point of number I cannot. I know that it is the most heavily traveled road leading into the city; it carries the largest volume of business, and has continuously and did in 1912. The volume of traffic is large; it being the only level road from the South into the city, both farmers and automobiles and freight of all kinds comes that way unless it goes by rail. The territory South of that point in the Duwamish Valley and also the White River Valley is also very thickly settled, at least portions of it,

and practically all cultivated in the valley, and the people living in those districts utilized this road in coming into Seattle. The post carrying the electric pole and lights is shown in Exhibit No. 6 and is the same alarm post which I have marked on my drawing. I could not say how long this alarm pole has been there. My recollection is it was not there in 1903 when I first began to travel the Interurban very extensively. It was put up after that some time. I do not know whether it was there in 1912, but I think it was. This picture having been taken in August, 1912, it must have been there then. I do not know how long it had been there before that. (Witness was shown plaintiffs' Exhibit 8, which is a photograph taken 60 feet from the crossing.) "This picture shows the bank that defendants' counsel has called my attention to that is West of the platform. It is covered with brush and vegetation. Plaintiffs' exhibit 8 shows what one of my photographs shows, only not so extensive because I was farther up the road,—it shows that as a car coming from Allentown comes on the southbound track, it comes into this pocket, as it were, and comes out here again. This is the fence as I have shown here on my map. From "B" Northeasterly is the one shown on the map from this point going up to the left up to here. To explain the method by which we surveyed these poles, I would say that the transit has stadia wires in it, and you take a stadia rod and it is marked into onehundredths, each hundred on the rod intercepted between those two cross hairs means a foot in horizontal distance plus the fixed or the constant in the transit; that is from the object glass to the center of the transit, and this is the usual method for surveyors or civil engineers to ascertain distances when you do not have it right down to the exact foot, because you see if you read your rod one-hundredth off you would be one foot off in your distance, and you see we had long distances here and we checked some of them so that—in fact we checked our transit so that we know that they are accurate, and for all ordinary work it is finer and quicker than the other method."

Recross-examination.

"While I have stated that I have been somewhat familiar, more or less, with this road for a number of years past, I do not remember whether before and during the month of July, 1912, there was a sign saying, 'Warning—300 feet to the railroad.' I saw it there in January of this year. I could not say when it was erected. I could not say it was there as much as 18 months ago."

#### Redirect Examination.

"Q. Mr. Gardner, from your experience and knowledge as a civil engineer you may state whether or not this is a dangerous crossing." (Counsel for defendants object. Objection sustained. Exception noted for plaintiffs.) "While I was there making this survey I made some observation with reference to the sound of an approaching Southbound car at this crossing, and I observed that as a car approaches from the North there is very little warning as far as the actual noise from the car goes, because

on account of this bank and the curvature in it when the car is approaching from the North and you are coming on the road here you will hardly hear it, especially if you are in an automobile, because this bank diverts this sound to the East and it turns to the South here and it has a tendency to divert it at right angles to the bank. I went across the bridge and on the East side, and the sound there is very distinct as compared to the sound up along the county road Southwest from the crossing. As you are coming down the county road the sound is not as distinct as it is anywhere to the East because this bank diverts the sound across the river."

#### Recross-examination.

"If I were standing back say 100 feet to the West of the tracks and had stopped and listened and there were no other noises I think I could hear a train coming all around the curve." Q. "You could hear it even farther back than this if there were no other noises? A. As I say, though, the ordinary noise which you hear from an Interurban car is very much lessened on account of this bank and the natural conditions of the crossing there." "I will tell you what happened when we were there making observations. We were up the road 90 feet when we were taking these photographs, and the car would start to approach before we would know it; we were watching the time, after we got through making our topography work, and a number of times, or three times, the car approached before we know it. We were listening for it and had our minds fixed on taking the picture, and we wanted to take the picture when the approaching car was coming. We were 90 feet from the crossing, and we could not hear the car until it got South of the Allentown bridge. I could not say how far North of the Riverton crossing the car was when we first heard it. I could not state definitely the distance. I know twice the car got down too far when we were standing back there; we went back there and while we were setting the focus in the road and we thought we would listen for the car, it got down in the pocket and we did not catch it, and then one of us had to stay at the crossing to make sure it was coming. It is only 1200 feet from the Riverton crossing up to Allentown. It is less than 1200 feet up to the draw-bridge which is South of Allentown Station, and about 1200 feet to the Allentown Station." Q. "Now, can't you give the jury the distance—I don't expect you to give it to them in exact feet, because I know that you didn't measure it, but so that we would get a fair idea when you were standing back 90 feet listening for this train,—how far North of the crossing it was when you could first hear it? A. Well, by standing here and not making any noise at all, as I recollect, we heard it just as it was pulling in to the Allentown Station," (Continuing) "which would be about 1200 feet North of the crossing, and we were 90 feet back from the railroad track, but the noise that we heard was practically nothing in comparison to the ordinary noise of the Interurban. We could hear it as plain as on the other side. We could hear it 1200

feet away when we were 90 feet back from the crossing, provided we stood perfectly still and made no noise at all and listened for it. The electric danger bell rang while these trains were passing on the day that we were there. We did not test it to see how far from the crossing we could hear it. We were back as much as 300 feet from the crossing when one of the trains passed, but I didn't pay any particular attention in regard to the gong ringing at the time, and do not know how far we could hear the gong down the road. I could only guess the distance, and I would rather not make a guess. The gong is a fairly good sized gong and makes just about as much noise as the gong on an ordinary street car."

# KENT BRODNIX, WITNESS ON BEHALF OF PLAINTIFF.

"My name is Kent Brodnix, and am an automobile driver and repair man, having followed this business seven years, and was following this business in July, 1912, and was then employed by Dr. Rininger, the deceased mentioned in this case. Dr. Rininger at that time owned a Sterns and I had been driving it a few days over three months prior to July 25, 1912. To a certain extent at that time I was familiar with this crossing known as the Riverton crossing. During the afternoon of July 25, 1912, Dr. Rininger, the nurse, Miss Davis, and the Doctor's sister, Miss Rininger, and myself had been to Kent. We were on our way back to Seattle, and

approached this crossing a few minutes after 4 in the afternoon. As I was coming along as usual and when I got to the top of this grade possibly 300 feet back from the crossing, as I always had done before, I released the engine from the machine and started coasting down this grade, using the brake to control the machine, and I got down almost to the store and I looked to the South to see if there was any trains approaching from that way, and then looked towards the North, and I could not see any there. We were going about 15 or 16 miles an hour, not to exceed that. As I looked to the North, I did not see any car, and I let the machine come on down, and I looked to the South again between the freight house and the store, and then turned and looked to the North again, and the car was only a short distance from the crossing. I mean by this the Interurban car. Before this I had made an effort to listen to ascertain whether there was any car approaching. I heard no sound at all of any approaching car. I did not hear any whistle or the ringing of any bell on the car." Q. "Do you know whether the Doctor himself made any effort to ascertain if there was a car approaching? A. Yes. Q. Now you may state to the jury what you saw the Doctor do, what efforts, or what the Doctor did in respect to ascertaining. A. He looked both ways. Q. When you say both ways, what do you mean? A. To the North and to the South. Q. And did he indicate to you as to what should be done? A. Well, he gave the customary signal to go ahead. Q. At that time as you

were approaching or at the time you saw the electric car approaching, was the electrical alarm ringing? A. Not that I heard." (Continuing.) "As soon as I saw the approaching electric car I set the brakes and locked both rear wheels and allowed the machine to stop as quick as possible. We were in the neighborhood of 25 to 30 feet West of the West track when I first saw the electric car. After I had set the brakes of the auto, both rear wheels skidded. I was able to bring the auto to a stand-still before the electric car came along. The speed of the electric car, I should judge, was from 40 to 45 miles an hour. The motorman was not slowing down the approaching car that I noticed. I should judge the electric car was from 100 to 150 feet away when I first saw it. The electric car struck the front end of the automobile." "Q. What happened? A. It picked the machine up and threw it back from the track about 35 feet and almost completely turned it around." (Continuing.) "The Doctor and the other two occupants were thrown from the machine, but I was not, as I was behind the steering wheel, which prevented me from being thrown. The Doctor was thrown into the front trucks of the car and dragged, I should say, about 50 feet, and was killed. The Doctor's sister was thrown just to the side of the track and Miss Davis was thrown clear through the cattle guard. Referring to Exhibit 10, we came along in the customary manner to the top of the hill, which was somewhere near the point marked "J" where I pushed the clutch out of the engine. Pushing the

clutch out disconnects the car with the engine. This was a down grade, and then the machine moved along of its own weight. Bearing in mind that this plat is drawn to a scale of 30 feet to an inch, I would say that when we first saw the electric car it would be at a point on this map one inch from the west rail of the West track. Just about one inch back up the highway. We were about 300 feet back when I disengaged the engine from the clutch and did not connect the clutch again with the engine before we reached the track. The autmobile was at the point marked letter "S" in lead pencil on this plat (Exhibit 10) when the electric car struck it. (Witness is shown plaintiffs' exhibit 1, which is a large photograph.) "I recognize the surroundings in this picture, and it shows the appearance of the highway at that time. It would be hard to make a mark on this picture to show where we were when the electric car struck us. It would be right in behind that railing. It is hard to make a mark there. I mean the railing that is on the platform in front of the store. This road as shown on this picture is a down grade towards the car track. Our automobile weighed, when it was not loaded with passengers, close to 5,000 pounds. Exhibit No. 9 is a picture of the crossing where the collision took place, and I am able to make an indication on this picture as to where we were when the electric car struck us. This is indicated by the letter "S" which I now mark on it, so that the point at the letter "S" on Exhibit 9 is approximately the location where the collision took place. As we

approached the crossing, we were going at a speed, I should judge, of about 15 miles an hour, not to exceed that. Ordinarily I could bring this automobile to a stand-still when proceeding at that rate under similar conditions, in about 25 feet." "Q. You may state whether or not that was a reasonable speed to run your car in approaching a crossing." (Mr. Tait: I object to that as the very question for the jury to determine. Objection sustained. Exception noted for plaintiffs.) "I have been driving an automobile about 7 years and am familiar with the general conditions under which an automobile should be operated." Q. You may state if you know what would be a reasonable rate of speed to approach a crossing similar to this with an automobile of the weight of this automobile with the number of passengers in it that you had at that time. (Counsel for defendants interposes the same objection. Objection sustained. Exception noted for plaintiffs.) "Since this acident occurred I have made personal observations of the surrounding conditions at the crossing, and I have made observation with reference to the ability to see a Southbound car or train approaching this crossing, and have also made observation with reference to the sound that is made by such a car, especially with reference to the ability of one being at this crossing to hear the approaching car. Last summer was the last time I made these observations. I also made similar observations shortly after the accident. I found that while you could see the car at the bridge, that it

goes completely out of sight from that time until it gets to the crossing. I mean by this bridge the one that is shown on plaintiff's exhibit 10, which is the bridge for the main highway across the Duwamish River." Q. Is there any point on or near the crossing where you could see an approaching Southbound car all the time after it leaves the Allentown station? A. Yes. Q. Whereabouts is that? A. I should judge 25 or 35 feet from the track." "You could see some portion of the car but not all of it after it leaves the Allentown Station. The perpendicular bluff there, with quite a bit of shrubbery on it, interferes with the vision or ability to see the car. When you are on the crossing you can see the car all the time. I also found that if you did not listen pretty close you would not hear an approaching car at all until it was right almost at the crosing. This was on account of the bluff, which has the effect of throwing the sound over across the river in an Easterly direction. That is the bluff diverts the sound and throws it Eastward." Q. Now at the time that you were approaching this crossing on July 25, 1912, state what information, if any, you had respecting these defects in your ability to see the car, or the diversion of the sound. A. Why, at that time I had not been informed at all. Q. Did you have any knowledge at that time about the difficulty in seeing an approaching car? A. No, sir. Q. What knowledge, if any, did you have at that time respecting the difficulty in hearing the sound of an approaching car? A. I knew nothing about it at all." (Continuing.) "During the season of 1912 there was considerable traffic over this crossing. This road carries the largest traffic of any road leading South from Seattle. It is practically the only road that the general public traveled at that time going South from the City of Seattle, and was the only road given in the route books. The street car proceeded about 200 feet, possibly more, after it struck us and before it came to a stand-still. I did not observe any conduct on the part of the motorman as his car approached us, as I was very busy with the auto." Q. You may state what if any, sounds or signs of warning or any other character of warnings that was given to you or the Doctor at that time as you approached the crossing. A. None that I heard. Q. Did you see any? A. No, sir. Q. Was there a watchman at the crossing at that time? A. No, sir. "I had never seen any watchman at this crossing before the accident. I do not know how frequently the cars and trains of the defendant passed this crossing at that time. I know that Dr. Rininger himself made effort to ascertain if there was an approaching car, as he looked both ways, North and South." Q. Did you listen as you were proceeding along to ascertain whether you could hear any sound of an approaching car? A. Yes. "At the time that I disengaged my clutch, the Doctor was in one of the front seats beside me talking to the occupants in the rear of the automobile. He was sitting somewhat sideways, facing to one side. We were going in a Northeasterly direction. Our machine was a right

hand drive, and the Doctor was sitting on the left hand side as you were going, and his face was turned toward the South as he was talking to the ladies in the back seat, and naturally he could readily see in a Southerly direction. He afterwards turned around and looked to the North. After he turned around and looked to the North, I think he turned back to the ladies, but I am not positive. When he turned around and looked toward the North, I should judge we were about 50 or 60 feet from the tracks. He did not carry on any conversation with me or the ladies after he looked toward the North." Q. You may state whether or not his position and attitude indicated that he was listening for sounds or signs of an approaching car. (Mr. Tait: I submit that the witness should be required to describe his attitude. The Court: The objection is sustained as leading.) Q. You may state in a general way what his conduct was with reference to the Doctor making observation to ascertain if there was an approaching car. A. Well, he sat there and was looking, and made no sound. He did not say anything." So far as I know the Doctor's hearing was normal and I had never detected any defect in his hearing, and I do not think that his eyesight was defective. At that time there was no defect in my hearing. It was normal as it always had been, and there was no defect in my eyesight or in my ability to see objects.

Cross-examination.

"Dr. Rininger's automobile was a Sterns, and I

should judge that it weighed close to 5,000 pounds, from 4,400 to 5,000. It was considered a four-passenger car. It would hold the chauffeur and one passenger on the front seat and two persons in the rear seat. That is an unusually heavy car for a 4-passenger car. I do not know what the average weight of an ordinary 7-passenger automobile is. I have never seen Dr. Rininger's car weighed. I estimate its weight by the horse power. You can make a fair estimate of the weight of an automobile from the horse power. The reason that I can estimate the weight of this machine from the horse power and cannot estimate the weight of a 7-passenger automobile is because 7-passenger automobiles are liable to have 30 or they may have 90 horsepower. All automobiles of 30 horse power have approximately the same weight and all automobiles of 50 horse power have approximately the same weight, and this is true irrespective of the seating capacity. This car was 60 horse power and 60 horse power is about the limit for the average 7-passenger touring automobile as a general thing. The majority of 7-passenger cars are six cylinder. In my judgment this 4-passenger car would weigh as much as the ordinary 7-passenger car. I had been driving automobiles in King County about six or seven months before this accident, and had passed the Riverton crossing before this accident 5 or 6 or 7 times coming and going, both ways; that is, going out and coming back altogether would be 6 or 7 times, and I had passed over it a number of times, several times at any rate, driving toward

Seattle. I could not say within what length of time preceding the accident I had passed over this same crossing, but it was within 2 or 3 months. I knew that the Interurban line was there and knew that the bluff was there. I did not know that the bluff obstructed our view of the train as it approached from the North. On the other occasions when I passed over the crossing driving toward Seattle, I looked to see if trains were coming, but did not discover on these previous occasions that the bluff cut off our view of a train coming from the North." Q. Well, if you looked how did you fail to discover that? A. Because you could see the track down by the bridge there and unless you looked close you would not know that the car would go out of sight between the bridge and the crossing. Q. Had you ever, on crossing over this crossing before, encountered a Southbound car? A. No, sir. Q. Did you ever see one coming? A. I don't think so, not that I remember of. Q. Then as a matter of fact, when you were reaching the crossing on the occasion of this particular accident you did not know whether the bluff would obstruct your view of the Southbound train all the way to Allentown or not? A. No, sir. Q. As you approached the railroad tracks were you looking towards the north continuously from the time you got within, say, 100 feet of the tracks, until you saw the train? A. No, sir. Q. Which way were you looking? A. I looked South and North both. (Continuing.) "I should judge I was about 25 feet —from 25 to 30 feet from the track when I first

saw the train. I had looked to the South just prior to that time and had looked to the North possibly 30 feet farther back, so that I should judge that the last time I looked toward the North I must have been about 55 feet from the track and saw no train. When I first saw the train I could not say exactly how far it was from the crossing, but I should judge about 100 feet, but I could not say positively, and when I first saw the train I saw it across the point of that bluff on the left hand side of the county road, and I was looking directly North or up the track in a Northerly direction at the moment the train came into view from around the bluff. I saw the train just as soon as it emerged from behind the point of the bluff. At that time we were running our automobile at about 12 miles an hour." Q. Well, I understood you to say this morning that you were running at fifteen or sixteen miles an hour. A. Well, right at that time I was not running as fast as I had coming down the hill. (Continuing.) "I was running from 15 to 16 miles an hour as far back, possibly, as 100 feet from the track, but when I saw the train coming, I should judge that I was not running to exceed 12 miles an hour, and we were then within 25 feet of the track." Q. And at 12 miles an hour, within what distance do you think you could have stopped your machine? A. Well, I don't know—I know I stopped it, that is all I know. Q. It took you 25 feet to stop it, didn't it? A. I should judge it was close to 25 feet. (Continuing.) "I first saw the train when I was within 25 feet of the track and then applied the brakes so hard that it skidded the rear wheels and the machine moved forward until the front end of the automobile was so close to the rails that the overhang of the electric car struck it. The front wheels did not cross the rails of the track, but stoped just before we got to the rail. We stopped about close enough so that the body of the car hit us. I think that our wheels skidded the entire 25 feet on the ground, or that distance, whether it was 25 feet or not I cannot say. The rear wheels skidded from the time that I set the brakes. It was the goose-neck of the automobile that was hit. That is the part of the frame that holds the front spring. It was struck on the right hand side first,—the right hand gooseneck. The goose neck is one of those two large springs in the front of the automobile that support the body above the axel. It is the part of the frame that goes out to the end and fastens to the outer end of the front spring, and it is probably the most forward portion; as a rule it projects farther than any other part of the automobile, and goes out nearly even with the front edge of the wheels. It was the front end of the electric car that struck the goose-neck. That is the forward right hand corner of the electric car, which whirled our front end around to the right. I threw the clutch out when we started down this little grade about 300 feet from the track. This disconnects the driving power of the engine from the rear axel of the automobile, but does not stop the engine, which continues to run and makes some noise,-

makes just about as much noise as it does while the clutch is connected, so that so far as the noise of the engine is concerned, it didn't make any difference whether we threw out the clutch or left the engine connected. I think the engine was still running at the time of the collision. I could not describe the amount of the noise the engine made, but it makes quite a little bit of noise." Q. Don't you think that it made noise enough to interfere, to some extent, with your ability to hear the approaching train? A. It might have. So that, if you had stopped your engine within, say, 50 or 75 feet of the track, don't you think you would have been better able to hear the approach of the train? A. I don't think so. (Continuing.) "There was other noises there besides the engine." Q. But the more noise your engine was making the harder it would be for you to hear, wouldn't it? A. I don't think that it would make very much difference. Q. It might make some difference? A. It might make a little. Q. You don't mean to have the jury understand as you testify, Mr. Brodnix, do you, that you could hear just as well, just as distinctly, with the engine running as you could have heard if you had stopped the engine, do you? A. If there was enough outside noise I don't see that it would make any difference. Q. What other noise was there? A. There was rigs traveling on the road. (Continuing.) "There was a wagon that I know of that was traveling behind us. I don't know just how far it was at that time, but this wagon was not struck by the train. This wagon

might have had a material influence with our hearing the approaching train besides the bluff, but I could not say whether it did or not. I did not hear it myself. If I had stopped the engine it is possible that I could have heard a little better. There was a coroner's inquest over the body of Dr. Rininger held the day after the accident in the undertaking parlors of Bonney-Watson Undertaking Company in Seattle, on July 26th, and I testified at that inquest. As to hearing the electric gong ringing at any time before the accident, I could not say absolutely positive, but I do not remember hearing it." Q. Did you or did you not, at the coroner's inquest, testify in substance and effect as follows: 'Q. How fast were you driving as you approached that track? A. I don't think I was traveling over 15 miles an hour. Q. There is a gong there, is there not, on the railroad? A. Yes, sir, there is a gong there. Q. Was the gong ringing? A. I didn't hear it until I was within about 15 feet of the track; was the first I heard the gong'. Did you or did you not testify in substance and effect as I have just read to you? A. I think I gave that, yes sir. Q. Now in giving that testimony you were testifying the day after the accident, were you not? A. Yes, sir. Q. And the facts were then, probably, somewhat fresher in your memory than they ar now? A. Well, I could not say that they were. Q. Well, having testified within a day after the accident that you heard the gong when you were within about 15 feet of it, what is your testimony now, that you did or did not

hear the gong before the accident? A. That I did not hear it. Q. Why did you testify at the coroner's inquest that you did hear it when you were within 15 feet of it? A. Under the conditions that I was naturally in after the accident I could not say positively. Q. Do you think you were mistaken in giving your testimony at the coroner's in quest? A. I think I was mistaken, yes sir. Q. But you did testify to it at that time, didn't you? A. Yes, sir. Q. At the time and place I have mentioned, did you or did you not testify in substance and effect as follows: 'Q. Did you hear the gong or see the train first? A. I saw the train first. Q. And after you saw the train you heard the gong? A. Yes, sir.' Did you testify to that effect? A. Yes, sir. Q. Notwithstanding that, you will wish to testify now that you did not hear the gong? A. I did hear the gong afterwards. I don't think I stated in that just when I heard it afterwards. (Continuing.) "Under the conditions it would be hard to say just how fast the railroad train was going when I first saw it. I have stated this morning that I thought it was going about 40 miles an hour. At the coroner's inquest I testified that I could not tell exactly about the speed of the railroad train, as I was looking over near the end of the car. I should guess about 30 miles or better." Q. Did you testify at the coroner's inquest in substance and effect, as follows: 'Q. If that gong was ringing before you saw the train, was there any reason why you could not have heard it? A. Only the noise of

the machine and the gong not being loud.' Did you testify to that? A. I think I did. Q. At the coroner's inquest, Mr. Brodnix, did you testify in substance and effect, as follows: 'Q. Where is the gong located with reference to the crossing? A. It is on the left hand side going this way. Q. Right at the crossing? A. It is right by, next to the bluff. Q. What kind of a gong is it? A. I did not look at it especially. It is a regular signal gong. Q. Is it such a gong as could be heard some distance if the engine was not in operation—nothing to obstruct the sound? A. If it was still I think it could be heard a block away.' Q. Did you testify to that effect? A. I think I did. Q. When you said 'if it was still', you referred to the engine in your automo bile? A. No, sir. Q. What did you refer to? A. I referred to any sound which might be there. Q. Now the question is 'Is it such a gong as could be heard some distance if the engine was not in operation—nothing to obstruct the sound', and your answer is 'If it was still I think it could be heard a block away'-you say you did not refer to the engine in that answer? A. It says there 'Nothing to obstruct the sound'. There could have been other sound besides the motor. (Continuing) "I had seen this electric signal in passing over this crossing before. I had seen the cross sign boards on it and knew that there was a railroad crossing there. I do not recollect a sign nailed on a telephone or telegraph pole on the right hand side of the road about 300 feet back from the crossing saying in substance

and effect "Danger, 300 feet to the railroad crossing." I have seen it since, but I had not seen it before the accident. It was a couple of weeks after the accident before I saw this sign. Not on the same pole but on the right hand side of the road I had noticed a sign posted by the Seattle Automobile Club giving warning. That was there on the left hand side on July 25th, but that was at the road that goes into the main road clear above the grade there. I don't know how far from the railroad, but I should judge 500 or 600 feet, possibly farther than that. I did not hear any whistle blown by this train. I don't say it was not blown, but I did not hear it. The customary signal that Dr. Rininger gave me to go ahead was a nod of the head. I could not say exactly how far we were from the track when he gave this signal, but according to my best recollection I was possibly 5 or 10 feet back from where I first saw the car. I should judge something like 30 or 35 feet from the track." Q. Now do you wish to say, Mr. Brodnix, that from 30 to 35 feet back from the track there would be any point between the crossing and Allentown where an ordinary passenger train would be obscured from view by reason of this bluff? A. Well now, as to that I could not say. Q. Don't you know as a matter of fact that if you had looked when you were 30 or 35 feet from the track that you could have seen a car at any point in that curve? A. No sir, I don't know it. (Continuing) "The weather was warm and the day was a clear, bright, sunny day. I don't remember

whether it had been warm and clear for some time before. The road, which was a macadamized road. was at that time dry." Q. Is not a dry macadamized road about as good a surface to stop on as you could get? A. No sir. Q. What would be better? A. Well, that road at that time was warmed by the sun and the pitch would roll. (Continuing) was a preparation of pitch. I don't know what it is made of, but it is a preparation of pitch and that pitch when warm is soft and gives but very little resistance. There was pitch on the road at that time. There was not a good deal of dry dust on the road. I had lived in Seattle and King County for six or seven months before the accident and knew that trains passed over that track at very frequent intervals. I did not know that two Interurban trains left Seattle and two Interurban trains left Tacoma every hour. When Dr. Rininger, as we approached the track, was talking to the ladies in the rear, in turning around to look back to them so as to talk to them, he was turned toward me and his back would be practically toward the North. I could not say exactly how close to the track we were when he turned around in his seat and looked toward the North, but somewhere about 50 or 60 feet, and when we were somewheres about 50 or 60 feet from the track he looked toward the North and I looked also and there was no train in sight. As we were going towards this railroad crossing there was no point at which we stopped before reaching the track for the purpose of looking and

listening to see if there was any train coming, and there was no time at which we were running less than twelve miles an hour until the train was within 25 feet of us, and I applied the brakes. I should judge I was running about 20 miles an hour when we got to the top of the hill back 300 feet from the track."

#### Re-Direct Examination.

Q. Mr. Brodnix, what was your mental condition for the next 24 hours after the accident? A. well, it was anything but good. Q. Was that due to the shock on account of the accident? A. Yes, sir. (Continuing) "The coroner's inquest was held the next day after the accident, and I had not recovered from the shock and excitement of the accident. Mr. Tait was present at the inquest. He was there representing the defendants in this action. There was no body there that I know of representing Mr. Rininger. It was rather an informal investigation by the coroner. I will explain a little more fully to the jury how it is that the weight of an automobile is estimated by the horsepower that it contains; that is the horse power of the engine. If the horse power is low, it is not necessary to have the weight of the frame there to hold it, and if the horse power is increased it is necessary that the frame and the rest of the car be built in proportion to the horse power. In other words, an automobile having an engine that develops sixty horse power must have a larger and heavier framework to stand the motor than an automobile that has only a thirty horse

power engine. As a general thing there is not a great many hundred pounds difference between the weight of a 7-passenger automobile and a 4-passenger automobile if they each have a 60 horse power engine, so that if a 7-passenger auto only had a 30 horse power engine it would not weigh much more than a 4-passenger auto with only a 30-horse power engine—it probably would not weigh over 500 pounds more any way. At the time that we approached this crossing I think our machine was entirely on the macadamized portion of the road. When we stopped we were not on the macadamized portion, as the two left-hand side wheels were on the macadam and the other two were off. Several minutes after the accident, I heard the gong ringing so that when I stated in one of my answers where I was asked whether I heard the gong or saw the car first, it was true that I did see the car first. I presume it was precaution that made the Doctor stop his conversation with the ladies and turn around to ascertain if there was a car on the track."

#### Re-Cross Examination.

"While I said that Mr. Tait was present at the coroner's inquest representing the defendant, there was some body else there who interrogated me. I did not know his name was Mr. Steele or that he was one of the prosecuting attorneys. I do not think Mr. Tait interrogated me. I presumed that the coroner was conducting it. I now state that after the accident I heard the electric danger signal

ringing the gong. I stayed down there some little time before I came to the City of Seattle. I do not know how long after the accident but there was a train came down from Seattle on the Southbound track to Riverton and stopped there for some time. I would not think it was as long as 15 or 20 minutes but I don't know, and I could not say whether the signal gong was ringing all the time that this second train was there or not, but it did ring part of the time. I don't know whether it was the second train as it came down that started the bell ringing or not. The gong was ringing part of the time that the train was standing there." Q. Was there any of the time that the second train stayed there that the gong did not ring? A. Well there were times when I did not hear it. Q. There were times when you were not paying any attention to it, was there not? A. Well, I could not say as to that.

## MRS. RORIA SPRINGER, WITNESS FOR PLAINTIFF.

Mrs. Roria Springer, witness on behalf of Plaintiff, testified as follows:

"I am a wife of Oscar Springer who is one of the deputy clerks at the county court house and reside at Riverton, and was residing there in July, 1912, at the same place." (Witness shown plaintiffs' exhibit No. 1). "I recognize this picture. That is a photograph of the highway as it leads down and across the tracks of the defendant at Riverton. On or about 4 o'clock in the afternoon of

July 25, 1912, I was at the station. I went down to the station with my sister. She was coming to town, and I saw this accident by which Dr. Rininger lost his life. I was at the point marked on exhibit 1 with the letter "D" at the time the electric car struck the auto; that is at that time I was at this point marked "D" on exhibit No. 1. A little girl and also my own little girl were with me at the time. I did not see the electric car just as it struck the auto, but did see it before it passed the crossing. I was about 30 feet, I presume, probably more than that, from the crossing. I was probably 15 feet from the platform of the store, that is about 15 feet West of the platform and was going directly from the station toward home. I had reached this point when the car came along. I did not hear any whistles from the approaching car as it came along. I have seen this electric gong that was on this post that is shown in plaintiffs' exhibit No. 6, and know where it is situated and have heard it ringing at different times, and I know what it is there for." Q. I will ask you to state whether or not that gong was ringing at the time of this accident. A. I did not hear it. (Continuing) "I did hear it ring sometime after; that is when the next car came along. Probably 15 or 20 minutes afterwards I heard it ring. It was a clear day, no wind was blowing, and if the gong had been ringing at that time I could have heard it. The automobile that the Doctor was riding in passed me and I was standing at that point (showing). I did not think that the automobile was run-

ning fast. I am not accustomed to riding in an automobile and would not be able to state at what rate of speed it was going. I have lived in the vicinity of Riverton about 5 years. I could not say how many people reside within 300 yards or 900 feet of this crossing, and there is a great deal of traffic over this thoroughfare, and there was such in July, 1912, and the cars of the defendant ran on these tracks at that time frequently. There were 4 trains an hour passing over this crossing. There was no flagman or guard maintained at the crossing at that time, and there were no gates maintained there to warn the public of approaching cars. I heard no whistles from the Southbound car which struck Dr. Rininger's automobile. If that Southbound car had blown the usual signals after it left Allentown Station and before I reached this crossing I think I would have heard it."

#### Cross-Examination.

"I cannot say the exact distance from this rail-road crossing at Riverton that we were living at the time of the accident. We lived on the second street back, near the school house about a quarter of a mile. At this particular time and on this particular day I was down to see my sister into town. She had boarded the train and gone, and I was walking back down the road on my way home. Just before the accident I stopped and talked a little bit to the South of the platform that leads from the railway to that grocery store; I was talking with Mr. Rosen-

burg, and I was facing the store and my side was toward the crossing and I was engaged in conversation with him at the time the collision occurred. I was not paying any attention to either the electric bell or the whistle of the train." Q. You do not wish to have the jury understand that you are swearing unqualifiedly, do you, that no whistles were blown? A. Well I said I did not hear them. Q. You did not hear it? That is all you know about it? A. Yes, sir. (Continuing) "I was standing there talking to Mr. Rosenberg at the time that the train, which collided with the automobile, came down the track and did not hear the electric signal ring. My attention was not fixed on it. If it rang I do not see why I should not hear it. I was not paying any attention to it but was close to it not more than 20 or 25 feet away from it." Q. Don't you know that it is about 70 or 75 feet from the railroad track to the platform that leads across the road to the grocery store? A I could not say. I have not measured it. (Continuing) "I was still farther down the road than that platform a short ways. After the accident, everything that occurred had a tendency to impress itself on my memory and I was paying attention then to everything that was going on, and when the local train, which followed the one which struck Dr. Rininger's car, came down and before it reached the crossing, this electric danger signal began to ring. I could not say that it rang all the time that the local train was standing there, as I did not hear it all the time, but it did ring for some

time after the local got there. At the time that the electric bell was ringing, when the local came down, I do not know whether the red signal lights on the top were burning or not. They did not show up in the day time anything like what they do at night. At the time of this accident there may have been, back about 300 feet from the road South of this crossing, a sign nailed up on a telephone or telegraph pole there, saying "Danger. 300 feet to the car track," but I don't remember seeing it then. I have seen it, but I don't know whether it was there before that. I can't remember."

#### Re-Direct Examination.

Q. Have you ever known of an instance prior to this accident where the trains had approached Riverton and this electric bell did not ring? Objected to by defendant as irrelevant, immaterial and incompetent. Objection sustained. The Court: "I think this is more properly rebutting testimony than it is direct testimony. If there should be evidence introduced by the defendant that the bell uniformly rang, then you would be allowed to show this in rebuttal, but in your case in chief I feel that I would have to sustain the objection." Exception noted.)

## SCOTT MALONE, WITNESS FOR PLAINTIFF TESTIFIED AS FOLLOWS:

"I was residing in Seattle in July, 1912, and have resided there since. My occupation at that time was deputy sheriff. I was at the scene of this

accident shortly after it occurred on the same afternoon. While I was there, I made observation respecting one's ability to see or hear approaching Southbound cars on the West track of defendant. I observed when standing about 50 feet West of the railroad track that a train approaching from the North, as it neared the crossing it passed completely out of sight, that is a man who was 50 feet West of the track would not be able to see a Southbound train or car all the way after it left Allentown. That it would pass completely out of sight before it got completely to the crossing. After it passed out of sight it could not be seen again by a person 50 feet West from the track until it got practically on the crossing, until it got on the sub-station on the North side of the crossing it would not be 40 or 50 feet from where an automobile would actually cross the railroad track before you could see it—it would be going right on the crossing. The reason for this is that there was a curve in the track and a high bank on the West side of the curve. At Allentown you could see the train 50 feet from the crosing, and it would get 150 or 200 yards from the crossing, it would begin to go out of sight behind this bank in the curve." (Witness shown plaintiffs' exhibit 7, which is a photograph taken 50 feet West of the track.) "This is substantially a correct representation of the appearance at that time. The bank which intercepts the view is located on the left side of the picture. There was brush and shrubby trees on the bank at that time. They were short like willows and things growing on the top of the bank and down toward both tracks. I don't remember exactly how close to the tracks that they came down but this brush and this foliage helped to obscure the view. It made the bank that much higher. There are poles that carry wire which run about every 100 feet apart that are in this curve on the track between the Riverton crossing and the Allentown Station. I don't know as they tended to obscure the view. While I was there there was a train came out which approached very slowly and stopped on the approaching side of the crossing."

### Cross-Examination.

"I made these observations for the purpose of determining how far away I could see a Southbound car coming, which observations were made the same afternoon after the accident. It must have been about an hour or so. I think it was the first Southbound train after I got there. I was not a passenger on the train. I went down with the coroner, as deputy sheriff. The coroner took me out there with him, and I was standing in this position when the train approached and as it went out of sight I called their attention to it, and then made a note of the distance that it was. I did this because I thought it was my duty in a case of that kind for the inquest." Q. Now, do I understand you to testify that when you were standing 50 feet back from the track that the regular passenger train will pass entirely out of view around that bluff; that you can't see it again

until it is almost at the crossing? A. Approximately 50 feet, not over 60 feet from the track. Q. It will pass entirely out of view? A. Yes, sir, entirely out of view at that distance. (Continuing) "I have just examined exhibit 7. It shows the picture was taken 50 feet back from the track. The picture looks as though it showed that the train could not possibly be out of view but it doesn't show that on that picture. It doesn't show it could not pass out." Q. That picture does not show the West track, it only shows the East track? A. It looks like it is impossible on that picture, but it is not a fact. Q. Then this picture is not right? A. Yes sir, it is right. That don't show the West track at all there. The train would pass completely out of sight as shown there in that picture. (Continuing) "At the extreme Westerly point of the belly of this curve, where it bellies into the bank, you can just barely see the Easterly track. You can't see the Southwest rail of the Easterly track." Q. I hand you a glass and the photograph and will ask you whether that track which appears in the extreme belly of the curve is not the Easterly or Northbound track. I want to know which track it is. A. I believe it does. This picture shows that. Q. Now then, according to this picture from which you have been testifying, there is no point in that curve at which a car traveling over the Easterly track would pass out of view. When you are standing back 50 feet from the track in the road? O. No sir, one traveling North would not. (Continuing) "A car traveling North on the

Easterly track would not pass out of sight, and the Westerly track, on which the train was which struck the automobile, is laid parallel to it and is a few feet from it to the West. While I did not measure the distance, I should think that the East rail of the West track and the West rail of the East track were 8 or 10 feet apart on the turn. I have an idea that the height of the ordinary Interurban passenger coach is the same as the street cars they use here. which would be 10, 11 or maybe 12 feet high." Q. And yet notwithstanding that you can see the train all the way around the curve on the East track, you still want the jury to understand that you are willing to swear that when you stand 50 feet from the track that a train coming South on the West track would go entirely out of your view; is that your testimony? A. Yes, sir. (Continuing) "I think I was down there within an hour after the accident, because we went immediately after Dr. Snyder got the information, and I guess he got it right away. The train that collided with the automobile was still there. I think the local which had followed the car that caused the accident had come in and had gone back to Seattle. It was not there when I got there. There was another train passed while I was there. I stayed there quite a while. There were trains came from the North, and I think probably a train from the South came in. I know I was there guite a while, and as these trains approached the crossing the electric bell began to ring." Q. How far back from the crossing do you think you could hear those electric

bells? (Objected to as not proper cross-examination. Objection overruled, and exception noted.) A. It would all depend on whether you were listening for the bell or whether you were—according to how you were going, whether in an automobile which was making noise. Q. If you were paying attention and listening for the electric bell how far down the road would you hear it? A. You would probably hear it 75 or 100 yards if you were listening for it. I don't know whether you could hear it that far or not—I would not testify you would hear it that far.

### Re-Direct Examination.

"When I arrived I observed where the train was that struck the automobile. It was about 325 feet somewheres over 300 feet, to the best of my judgment, South of the crossing. The train men informed me that the train had not moved from the place where it was stopped after the accident, so it was in the same position that it was when they stopped it."

#### Re-Cross Examination.

"You understood me to say that when I got down where the Southbound train, that collided with the automobile, was, it was about 300 feet South of the crossing." Q. Don't you mean about 200 feet? A. No, sir. (Continuing) "Yes, sir, I counted the poles. I remember at the time I think I counted the poles and I estimated at that time it was about 325 feet." Q. Near what pole was the train standing South of the crossing? Which pole was it that was nearest to the front end of the train? A.

Three lengths—it must have been four poles to make three lengths of poles from the crossing. Q. Do you recollect counting four poles? A. I counted the length of the poles from the crossing, to the best of my recollection. (Continuing) "I mean I counted the distance between the poles. I testified at the coroner's inquest." Q. Did you testify at that time in substance and effect as follows: 'Did you observe where this train was standing after the collision? A. Yes, sir. Q. How far was that from the crossing? A. Well, that was all I could figure, from those poles; they told me they were 100 feet apart. Three of those light poles and about 25 or 30 feet further', did you testify to that? A. Yes. 'Q. Do you know whether the train had moved? A. The train crew said it had not been moved. Q. It stood where they made the emergency stop? A. Yes, they took the fellow on a cow-catcher. Q. What was the distance from the crossing? A. 100 yards. Q. 300 feet? A. Yes, sir. I understood those poles are 100 feet apart. Q. There were three of them. A. There was 3 of them and from here up to the corner of the window over that. Q. How far was the automobile from the railway track, was it still lying there?" Did you testify, in substance and effect, as I have just read at the coroner's inquest? A. Yes. (Continuing) "I counted 3 light poles South of the crossing. I think to the best of my recollection there was one right South, right South of the freight platform —one right at the North end of the freight platform next to the road, but I did not count that as one. I think that the front end of the train was past the fourth pole counting that one by the side of the road. I walked down to where the train was standing 2 or 3 times. I am almost positive that the front end of the train was past the fourth pole for the reason that I figured at that time what distance it would be and I made a little note that it was over 100 yards, over 300 feet."

#### Redirect Examination.

"The testimony which I gave at the coroner's inquest was the next day after I was down there when the matter was fresh in my mind. Mr. Tait was present at that examination, and also Mr. Steele from the Prosecuting Attorney's Office."

# TRENA BROCK, WITNESS FOR PLAINTIFFS. TESTIFIED AS FOLLOWS:

"I am 13 years old and was with Mrs. Springer the afternoon that the train struck the automobile at the Riverton crossing. I had not been down to the station with her. I just came out of Mr. Rosenberg's store shown on this picture, exhibit No. 1. I had started back home with Mrs. Springer as she came by the store. I should judge it was about 10 minutes after I started with Mrs. Springer before the electric train came along. I heard no whistles from the train that was coming South, and I did not hear the electric gong. I know about the electric gong that is near the crossing and that it rings usually when trains come along, but I did not hear it ring at that time. I was no farther away from the bell

than Mrs. Springer was. I had been in the street after the time that I joined Mrs. Springer and before the accident and that was about 10 minutes."

#### Cross-Examination.

"I was thirteen in May last year, and live about a quarter of a mile from the Riverton Crossing near where Mrs. Springer lives. She is not related to me in any way. I did not go down to the station with her. I just went to the store, and she passed by on her way home as I came out of the store." Q. Now, all you know about it is that if the whistles on that train blew you do not recollect hearing them? A. No, sir. (Continuing) "It may have blown without my hearing it. I had lived there before this accident about a year and a half and had become pretty well used to hearing the electric bell ringing. and I got so that I didn't pay any attention to it, so that when this train that struck the automobile came along it may have been ringing and without my paying any attention to it." Q. You do not know of your own knowledge whether it was ringing or not ringing? A. I did not hear it and I usually listened for it. Q. You were not listening to see whether it did ring, were you? A. No. sir.

#### Re-Direct Examination.

"I was asked shortly after the accident whether or not the bell was ringing and my atention was then called to it. It is a fact that right away after the accident my attention was called to this matter and my statement then was that I did not hear it."

#### Re-Cross Examination.

"I don't remember who it was who talked to me about it. It was about 20 minutes after the accident when some one talked with me. It was not Mrs. Springer who asked me. I went back to the station—down to the platform. It was a girl, I think, a girl larger than I was. I don't know how she came to ask whether I heard the bell ring or not. She just asked me if the bell was ringing and I stayed there about a half hour after the collision. I recollect when the two-coach train came down after the accident and stopped at the crossing and the bell was then ringing and I heard it, but am not absolutely sure whether it was ringing the first time or not. After this little girl asked me if I heard it ringing no body else has talked with me about it except Mr. Hastings, who asked just what he asked me now, and I told him it was not ringing, that I didn't hear it. I did not go up to his office and talk with him. I have never talked with Mrs. Rininger about it. Never talked to any body about it since the day of the accident. No body asked me any questions from the day of the accident until I just testified a minute ago as to whether I heard the bell ringing."

## ISAAC N. EAST, WITNESS FOR PLAINTIFFS TESTIFIED AS FOLLOWS:

"I reside at 228 Orcas Street in Georgetown; have resided there about 10 years. My occupation is that of a tea man. I have a tea and coffee route through the country in the South end of the town

and was engaged in that business in July, 1912. I have been in it for the last 9 years and I travel out through the various neighborhoods South of Georgetown. My territory is from Spokane Avenue South to Des Moines and between the Sound and the N. P. Railroad and I take in Tukwila and Foster. That is, I have the territory for selling our teas in that locality. I have regular customers up there that I call every week. I have a regular route that I travel once a week. I make the trip with a team and wagon. In July, 1912, my team was a Grand Union tea wagon. I guess most everybody is familiar with it. It is just a medium size delivery wagon; two horses, one is a grey horse and the other is a bay, and they weigh about 1000 pounds apiece. I am familiar with the highway crossing across the Riverton Crossing, and have been familiar with it for more than 7 years. I have been over this road once a week, up and back as a rule unless there was a holiday came on my delivery date. For 7 years, or probably a little more than that, I have been over it once a week, and during that time have become familiar with the traffic that passes over it. There is almost a continuous traffic there during the day, and it was fully as much in July, 1912, as any time before or since, I think. I didn't see any difference. It doesn't vary much. And that congested traffic has existed ever since I have been going over the road. I must have been over that crossing between 700 and 800 times." Q. Do you know whether or not there is any danger to travelers in approaching and going across that

crossing? (Counsel for defendants objects. Objection sustained. Exception noted for plaintiffs.) "I have stated that in July, 1912, and for some time prior to that it was almost a continuous traffic over that thoroughfare during the day time. There is teams there backwards and forwards almost all the time. At that time I think there were 4 trains a day passing over the tracks-two single cars and two double car trains and then sometime a freight train in between them. The single cars were known as the flyer or limited. By that is meant that it does not stop between Seattle and Tacoma as I know of; maybe it stops at Auburn. I don't know as to that. I never rode over it, but it makes no stops at the stations this side of Kent. The rate of speed that those limited trains usually run over this crossing was about 25 or 30 miles an hour. At about 4 o'clock on the afternoon of the day the accident occurred, I was coming home right there just about Rivereon; was approaching the crossing. I saw the automobile that was occupied by some one; I did not then know who it was, but I afterwards found it was the Doctor. They passed me somewhere near where Dr. Brown used to keep his automobile; I don't know just how far that is. Any body that is familiar with the road knows it sits right in the bank on the right hand side as you go South. They overtook me and passed me on the left side. At the time I was traveling about 4 or 5 miles an hour, and the rate of speed that the automobile was proceeding at was probably 12 miles an hour. After they passed me I kept going right

along behind them and I saw the electric car strike the automobile. I was probably 50 or 75 feet from the crossing when the collision took place. I could not tell exactly: I was just behind those people a little ways. I did not hear any whistles from the approaching car. I was right there on the road. I think I could have heard the whistle of the train if any body could. The alarm gong there at the crossing was not ringing. I am positive of that. Several minutes after the accident it was ringing because I stood right under it." (Witness shown plaintiffs' exhibit 6, a photograph showing this electric gong.) "I stood right here just across the street. I just helped the lady up on her feet that was thrown out of the automobile and stepped back a few steps and stood there. It was quite a little bit after that before the gong began ringing; I could not say just how long. I did not look at my watch. The automobile was coming down at a slow rate of speed and the car darted out from behind that hill there and struck them. The front wheels of the automobile stood on the plank that lies on the right hand side of the right hand rail going South. It shoved the tires back from the bottom of the automobile about that far (showing), probably a foot or fifteen inches, and the left hand wheel took up a little sliver in the plank that stood up about that high (showing), at least it was partially took up and stood right that way, and the automobile cramped to the right and ran back and turned a little more than half way round with the end rather turned back up the street. After the

collision the two ladies laid in the street, one across the cattle guard with her head towards the East and her feet a little bit towards the Northwest, the other one laid with her face towards the cattle guard in the street, and the Doctor laid up under the freight shed. The top of the automobile was down so that I could see the occupants all the time, as I was sitting above them in the wagon. The seat in my wagon is so arranged that it is elevated high enough so that I could see over the horses and into the automobile. I was about 50 feet from the automobile when the car struck it, or a little less, I could not tell exactly, but I know I was there almost in a minute with my team hitched and on the ground. The Doctor was killed. He was dead when I got to him. I helped what I heard afterwards was the Doctor's sister helped her to get up on her feet. The other lady, there was a number of other people helping her so that I didn't need to go there. I did not hear the train approaching." Q. What has been your observation with respect to being able to see a Southbound car on the West track as it approached this crossing? A. I should judge you would have to be within 25 feet of the track at the least calculation to see it. (Continuing) "Because there is a bluff and shrubbery and one thing and another there that obstructs your view, and then the car circles in towards the bank. I could not say positively whether or not it is a fact that if a person stood between 50 and 60 feet west of the track they could see a Southbound train at all times after it left the

Riverton Station; I never took any notice as to that. I have noticed that from that crossing and other places it is nearly impossible to hear where there is a bank or a bluff shields it. I did not hear that day this Southbound car. I have noticed at other times that it has been difficult to hear the train approaching, because I know that I came near driving out there on to the road because I heard nothing; that was before the gong was there." Q. Can one readily hear the rumble of the approaching train? A. I think not. (Continuing) "This is on account of the bluff, I suppose. The bluff diverts the sound Eastward." Q. Have you any personal knowledge, and if so state what it is, respecting this gong that was maintained at this crossing by defendant not ringing as trains approached; which knowledge you acquired before this accident? (Defendant objects. Objection sustained. Exception noted for plaintiffs.) (Continuing) "No flagman or gates were maintained at this crossing before the accident." Q. Mr. East, did you have any personal knowledge of any accidents between travelers and cars or trains of the defendants occurring at this crossing prior to the date of this accident? (Objected to as irrelevant, immaterial and in competent.)

Mr. TAIT: I object to that as irrelevant, immaterial and incompetent.

THE COURT: Objection sustained.

MR. HASTINGS: I have some authorities here that it is competent to show that other accidents occurring at a crossing can be shown for the purpose of showing its dangerous character, and I expect to do that before we are through.

MR. TAIT: Now, before counsel begins I wish to tell the court and I want it to appear in the record, that the way in which the complaint was originally drawn, allegations covering what counsel is now seeking to prove were made and I move to strike those allegations out on the ground that they were irrelevant, immaterial, incompetent and redundant, and the matter was argued before Judge Neterer and Judge Neterer sustained the motion and the allegations were stricken out and an amendment to the complaint was put in here with these allegations omitted. Now the question was plainly before the court and it is certainly the law of the case as far as this case is concerned; if Your Honor will look at the original complaint you will find it.

MR. HASTINGS: That is true, but the court made an error, and it is always the rule that if an error is made, during the course of the trial the court is willing to correct it.

THE COURT: It would lead to confusion if a court of co-ordinate jurisdiction with another started out to attempt to correct mistakes of another judge. Unless your authorities were controlling on this court, it would be my idea that you cannot call upon the defendant to try all these other accidents and show that they did not happen by reason of negligence. I will sustain the objection. Exception allowed.

Objection sustained. Exception allowed.

#### Cross-Examination.

"At the time Dr. Rininger was passing my wagon, I was probably 250 or 300 feet, somewheres along there, from the railroad crossing, at the point where the grade begins to slope down toward the track, and I think the automobile was only going between 12 and 15 miles an hour. I could not say exactly. It was running slow. I know that." the man who was running the automobile fixes the rate of speed at 20 miles an hour, I could not say whether he was right or I was right. I should judge from the way I was traveling they were going twice or three times as fast as I was. I was going 3 or 4 miles an hour. It did not take it long to pass me. I never operated an automobile. I have probably ridden in one a dozen times. I am not an expert on the speed of automobiles. From all appearances and the way I drove behind it, it was just drifting of its own weight as it got down pretty near the track. It possibly kept up the same rate of speed at which it was going when it passed me until it got down close to the track, but I don't know. I didn't pay any attention to the speed it was going after it passed me. I did not pay very much atention to its speed while it was passing me. I do not know much about the speed at which it was going when it passed me except I know it was not going very fast. At the time of the collision I think I had driven my wagon up to within 50 or 75 feet of the track. I do not remember any other vehicles there at that time. I think I had the only wagon and team. There was

one team on the other side of the crossing just after the accident. He had stopped for the crossing, I think. Of course, I could not see on the other side until after the car passed. That team stopped probably 50 or 75 feet I think from the crossing. I did not pay much attention to it. I could not tell what the wagon was loaded with or whether it was loaded. I think it was a one-horse wagon going South. I mean to tell the jury that when you are within 50 or 75 feet of that crossing you can hear the regular road crossing whistle blown back up there just after it leaves Allentown; my hearing is pretty good. I think it is just as good as any body's. Q. What is it that impresses it on your mind so thoroughly that the electric bell was not ringing as that train came towards the crossing? A. What impresses it on anybody's mind. It was not ringing and that is all there was to it. I stood right there under the bell, and if it had been ringing I would have heard it. (Continuing) "The next time I passed this crossing was the next week on Thursday I think Thursday was my day there; I always went on the same day of the week. I passed there the next week. I went up about 9 to 10 oclock in the morning and came back at 4, or between 4 and 5. That was my regular trip. I did not notice any trains pass at that time. I do not recollect whether any train was passing the crossing as I approached it on the next Thursday after the accident. I do not think there was any train passing at that time. I passed this crossing just the week before the day of the accident.

As to whether there was an approaching train on the day that I passed the crossing a week previous to the accident or whether the gong was ringing or not I cannot remember. The reason why I do not recollect anything about the week before or the week after and the reason why I am absolutely dead sure that there was no gong ringing at this particular time is because I stood right there under it and was listening to it, and if it had been ringing I would have heard it. If I had been off somewheres else I would not have heard it. I know that there is an electrical contrivance located about 1200 feet North of the crossing called the "cut-in," and that when the third rail shoe on the Southbound train passes over that cut-in, it automatically starts the bell to ringing and that the bell rings from that time until the train crosses the road, and that some 15 or 20 feet on the South of the wagon road there is another electrical appliance that they call the "cutout," and that when the train passes over that cutout it stops the bell from ringing. I know that it does not always start it and as far as stopping it, it could not have stopped it if it was not started. I know they don't always ring. I know there is such a contrivance. As the train passes 18 or 20 feet South of that crossing it does not always stop the bell ringing. This happens frequently. I could not tell any particular day because I did not take out my book and set it down. I cannot tell the jury one day when it occurred because I did not take a note of it. I did take my book and set down on the day

Dr. Rininger was killed. This book I left at home. I did not bring this book along at this time because I didn't think of it. It is a little day-book I had in my pocket. I set it down at the time that I got up here. I did not set anything else down in the book. I set it down because I just happened to write it down there is all. I didn't happen to write down these other occasions when the bells were not ringing because it was not necessary. It was necessary to write it down this time because it was an accident. I did not expect to be called as a witness because I heard a long time ago that the case was settled. It was all out of my mind until just here lately. I don't know that I could find this little book. It may be misplayed. I can recollect this matter without ever writing it down." Q. How long a time was it from the time you first saw the Southbound passenger train until the collision between it and the automobile occurred? A. Just about that long (witness snaps his hands). It may have been just about that long before the train passed over 20 feet South of the road. It was going at a pretty good speed. The two-coach passenger train came up about 20 minutes later from the North and as it came up the electric bell started ringing, it started ringing some time after the accident. I could not say just exactly how long. I could not say that it started to ring just before the two-coach passenger came down, I did not pay any attention to it. I did not put that down in my book because I did not think it was necessary, but I do recollect that the bell rang after the twocoach train came down. The two-coach train stood there until I left. There were 4 trains there when I left, probably 20 or 25 minutes after the accident. I mean to say that you have to be within 25 feet of the Southbound track in order to see a Southbound train when it approaches the crossing, but I never paid any attention to it when it was down toward Allentown. In other words if you get farther than 25 feet back from the track there is a point in that curve where the train would pass entirely out of sight. I have stopped there and waited for the train to go by. I never took any measurements to see how far back you would have to stand or how close you would have to be to the track in order to see the train at the extreme point of the belly of the curve. I think it would be about 25 feet. This room is about 50 feet. I don't think you could stand back the length of this room and see the train all around the curve. I have noticed this when I have stood there waiting for a train to go by."

MR. HASTINGS: We now offer to prove by Mr. East, who has heretofore been sworn, that prior to July 25, 1912, other accidents had occurred at this same crossing; that there were several minor accidents, and that this is offered for the purpose of imparting notice to the defendant of the dangerous character of this crossing, so that the defendant with such knowledge of this dangerous character was charged with a greater duty in carefully operating its train across there, and in connection with this offer that there were at least two fatal accidents

at this same crossing before this accident. This offer is not for the purpose of showing that those particular accidents were the result of negligence on the part of the defendant, because that would raise a collateral issue, but for the purpose of showing that it was a dangerous crossing and they had had knowledge of that danger.

THE COURT: Was the ruling of Judge Neterer to the effect that the pleading of it was improper, or to the effect that it raised a collateral issue?

MR. TAIT: His ruling expressed precisely the same thought that Your Honor did, and that was that we would be brought into court here to defend against various accidents which might have been caused wholly through the fault of the person who was injured, and if those things should be proven, in order to keep ourselves anywhere free from blame in the minds of the jury we would have to go into the merits of those accidents. It was to keep out those collateral issues.

MR. HASTINGS: That is true; Judge Neterer based his decision on the ground that it was raising a collateral issue, and for the purpose of determining whether these defendants were guilty of negligence in the other accident. I concede that we cannot do that. We cannot go into the question that the defendant was guilty of negligence in those other accidents, but the fact that there were other accidents is proof of the fact that it is a dangerous crossing and that is an element which must be con-

sidered by the jury in determining whether the defendant should not have maintained a flagman at this time on this crossing.

THE COURT: I feel that I am bound to adhere to my former ruling and sustain the objection to this offer, not only on account of my own reasons but on account of those of Judge Neterer. (Exception noted for plaintiffs.)

# ELORA LAMB, WITNESS FOR PLAINTIFFS, TESTIFIED AS FOLLOWS:

"My age is 21. I am a chauffeur and mechanic and was such in July, 1912, and am accustomed to driving automobiles. At about 4 o'clock in the afternoon of July 25, 1912, I was standing on the waiting or passenger station of defendants' railroad at Riverton waiting for the Seattle or Northbound train. I saw Dr. Rininger's automobile approaching the crossing. (Witness shown plaintiffs' exhibit 10.) I notice the station in this picture. I was standing on the platform at about the point marked "A" in pencil thereon. I should judge that the automobile was approaching the crossing at a rate of speed between 12 and 15 miles an hour. It was being driven by Mr. Brodnix." Q. Did you observe whether or not he made any effort to see whether a train was approaching? A. I seen him looking both ways. (Continuing) "At that time I could and did, from my side, see the Southbound car on the West track of the defendants' line. It was at the rock quarry when I first saw it just between Allentown and the rock quarry, which is a point North of the Allentown Station, and I continued to observe it as it proceeded Southward and observed it until it struck the auto. From where I was on the platform I could see it during all the time that it was going South. It was running at a rate of speed between 45 and 50 miles an hour. It seemed to slacken just a little bit, not much, as it approached the crossing. I did not hear any whistles blown on the train, and I was watching it all the time. I am sure I could have heard the whistles if any had been blown on this train. There was nothing the matter with my hearing. It was all right, and there was no defect in my vision or means of seeing at the time. The whistle was not blown. I did not hear it at all. I am sure I could have heard it if it had been blown because I have heard them lots of times there. The electric gong maintained at the crossing did not ring at that time. I was about 75 feet from it. After the collision when the next flyer came through it rang. It rang regularly and did not ring fast—you know, now and then a tap. At that time I had been out home to see my parents who lived out beyond there at that time, and continued to live there until about five months ago. It was a frequent occurrence for me to go out there to that station. I went out every week. At that time I was familiar with the driving of automobiles. The automobile was approaching the crossing at a rate of between 12 and 15 miles an hour." Q. Now, from your knowledge and experience as an automobile driver, would you say that that was a reasonable or an unreasonable rate of speed for an automobile to approach that crossing? (Mr. Tait: "I object to that; I think he can testify as to the rate of speed it was moving, but what is a reasonable speed in approaching a rail-raod crossing is always dependent on the peculiar circumstances of each particular case, and that is a question for the jury to decide." Objection sustained. Exception noted for plaintiffs.) (Continuing) "After the accident I remained there about three-quarters of an hour and while there other trains came in. The bell rang irregularly when the other train came. There was no difference in its ringing between the approach of a Northbound train or a Southbound train. It was just the same."

## Cross-Examination.

"I have been a chauffeur about six years driving somebody else's machine. Am now 21 years and began driving at 15 years. I worked for the Winton people, R. H. and H. Graves, the Seattle Garage Company, the Junction Transfer Company, Mrs. D. W. Walker and Mrs. Agnes Stimson. Am now working for the Junction Transfer Company in the transfer business, driving and taking care of trucks. I knew Mr. Brodnix. I met him there in the Sterns Garage probably a couple of months before the accident, and have known him fairly well since that time. I do not see him very often because I am on the other side, on the West side nearly all the time. I mean by the West side, over in West Seattle. That

is where our transfer office is. He and I are quite friendly. We have not talked over this accident many times. I have never talked it over with him. Mr. Brodnix has never discussed this accident at all at any time with me. He and I never did. I never talked with anybody about the accident only I told my people about it. I told my friends and my parents. That is all I ever told. At the time the Rininger automobile was approaching the track I was standing on the East side of the track, which gave me an opportunity to see the train at every point as it came around the curve because I was standing on the inside of the curve. I could also see down the roa. for a considerable distance and see the automobile coming. A Sterns automobile weighing 4500 to 5,000 pounds running at the rate of speed of this machine I do not believe, under an emergency stop, could be stopped under 20 or 25 feet. I think 20 or 25 feet is the least distance you could stop an automobile running at 15 miles an hour on that road, which is a down grade. If it was running at 12 miles an hour you could stop it within 15 feet. This automobile was coming almost directly toward me in a kind of Northeasterly direction, in the general direction in which I stood. It is a good deal harder to judge the speed of an object moving toward you than if it is moving past you. I think I was in a position to exercise good judgment as to the rate of speed at which the automobile was moving in view of the fact that it was coming right towards me. The train appeared to slacken just as it got North

of the big bend, the biggest bend in the track, there about 400 feet North of the crossing. It then slowed down just a very little. I should think the train was moving at the rate of 40 miles an hour when it actually struck the automobile. I saw the wheels on the automobile skidding. They skidded between 20 and 25 feet."

## Re-Direct Examination.

"The Junction Transfer Company's office is on 9th Ave. and California St. in West Seattle. Most of my work is over there. The train that set the bell in motion immediately after the accident was the flyer which came from Tacoma coming North. It was at that time that the bell did not act vigorously." Q. Did you, within a short time previous to the accident referred to, ever notice or observe any defective ringing of this bell, this gong, at the crossing as the trains approached? (Objected to by defendant. Objection sustained. Exceptions noted for plaintiffs.)

# MRS. OLIVE RININGER LYFORD, WITNESS FOR PLAINTIFFS, TESTIFIED AS FOLLOWS:

"I am a sister of Dr. Rininger who was killed. At the time I was in the right hand back seat of the automobile just back of the chauffeur as the auto was approaching the crossing. Miss Davis occupied the other seat. She is now dead. We had been to Kent, and were on our way back. Just before we got to the crossing at Riverton, the Dr. was turned talking to Miss Davis and me with his face towards

us. He was occupying the front seat on the left side turned toward the chauffeur. I can't say how long he continued in this position, because we were talking quite a while, but he occupied this position until the driver put on the brakes. I have no judgment of distances whatever, and cannot say how far that was from the crossing, but I should judge we were just about at the top of the hill. I remember the store that is out there just West of the tracks. I can't say it was before we reached he store. After the chauffeur applied the brakes, the Dr. turned and looked both ways, that is, North and South. After that he did not turn back to us or speak to Miss Davis or myself. His face was not turned towards us at all after that. He appeared to be giving some attention to ascertain whether a car was approaching or not when he turned from me and looked both ways. After he turned, I think Miss Davis and I went on talking. I saw the car that struck the auto as it was approaching, but after I saw it it was so quick there was not time for a word or anything. We were right close to the crossing. When the electric car came in sight, the chauffeur made an effort to stop the automobile. From the jolt that we got before the train struck us I should say that the automobile had come to a stop. I heard no whistles from the approaching train and heard no signals whatever from the gong ringing. When the car struck the auto I was thrown. My recollection of events occurring after that were very vague, because I was bruised badly. When Miss Davis and I boarded the

train to Seattle, I remember of hearing a gong, but before that I cannot say. Of course, everything was in confusion. I was bruised from the accident.

## Cross-examination.

Mr. Tait: "Mrs. Lyford, there is one point that is not quite clear to me; I understood you to say that Dr. Rininger had turned partly around in his seat so as to be able to talk to you and Miss Davis, and that he kept up that position and carried on the conversation with you and Miss Davis until the chauffeur applied the brakes; now when you speak of the chauffeur applying the brakes, do you mean that he had applied the brakes just as the train hove in sight, say 20 or 25 feet? A. No, sir. It must have been at the top of the grade. It was long before we saw the train. (Continuing.) "I can't say as to the distance, but it was as we were coming to the grade. After we reached the grade and were coming down the grade towards the track, the Doctor turned around and faced toward the front of the automobile. and my recollection is that he looked in both directions. I am no judge of distances, and I can't say how far we were from the track when I first observed the Doctor looking towards the North." A. Well, did not the train come into sight very quickly after you saw him looking towards the North; wasn't it just a sort of momentary thing? A. As to that I do not remember now. (Continuing.) "I saw him nod his head as a signal to the chauffeur to proceed. I cannot recollect how far that was from the track.

I was accustomed to riding with the Doctor frequently. I did not become accustomed to estimate the speed of automobiles unless I was in the front seat and could see the speedometer. I had no idea whatever of the speed. I could not testify how far we were from the track when we first saw the train, because I do not know but the collision occurred almost instantly after I saw the train. There was not time for a sound from any of us. I can't say that Miss Davis was talking to me continuously or that I was talking to her continuously all the way down the grade, but I know that we were in conversation at the time because her head was turned toward me. It was on my left. I was paying no further attention to the fact that we were approaching a railroad track than a third or fourth person would in a machine. I had perfect confidence in the Doctor, and had no reason to do anything else but to rely upon the Doctor taking the necessary precaution to make the crossing in safety, but my attention was directed to the subject of the electric gong signal ringing before the accident, as it would to anyone who would be in conversation with another. I heard no gongs ringing and saw no signals whatever as we were approaching the crossing. Miss Davis and I kept up the conversation until the train came in view. It is possible that the train may have blown a whistle a quarter of a mile or a half mile up the track and I did not hear it, and perhaps the electric bell might have been ringing without my being conscious of it."

## Re-direct Examination.

"At the time my hearing was all right and so was my sense of sight, and as we were approaching the crossing I was aware of it."

# ANNA M. GOOKSTETTER, WITNESS FOR PLAINTIFF, TESTIFIED AS FOLLOWS:

"I am now private secretary to Dr. Lamson, and was private secretary for Dr. Rininger in July, 1912. I had been so employed by Dr. Rininger since September, 1909. I had, as his private secretary, charge of his books of account. These books show the charges for his services made in his profession. My employment was in his office and I was therefore personally familiar with his business affairs and I was and am familiar with the amount of the charges made by the Doctor for his professional services during the years 1910, 1911 and up to the date of his death in 1912. The charges for his services, during the year 1910, were over \$56,000. I have a little book that I put down every month the amount of the work done and the amount of cash received, which I have with me. These items were put down at the close of each month. (Witness hands the book to counsel for defendant.) These are the same pages that I showed to you in the office the other day, and the entries are made in my own hand writing and were taken by me from the entries made on the ledger and totaled them at the end of each month. Refreshing my memory from this book, I find that the exact total charges made by Dr. Rininger for the

year 1910 was \$57,168.30, and the total charges for his services in his office during the year 1911 was \$56,518.15, and the charges for his services for the year 1912, up to the date of his death in July was \$38,418.25. The amount of actual cash that was actually received by the Doctor for the year 1910 was \$36,193.94, and the cash taken in by him for the year 1911 was \$36,196.11, and up to the date f his death in the year 1912 it was \$25,743.30. I do not know the exact amount that has been collected on these accounts since his death by his executors, but approximately \$20,000, and collections are still being made on the accounts."

## Cross-examination.

Q. Now, Miss Gookstetter, you have stated that in 1910 you actually collected something over \$36,-000; what were the expenses for that year in connection with the Doctor's business? (Objected to as immaterial. Objection overruled. Exception noted for plaintiffs.) (Continuing.) "The expenses from January 1, 1910, to January 1, 1911, were \$13,-536.71. My books do not show the difference between these two items—the net cash. His expenses for 1911 were \$13,617.97. I have not got his expenses during the year 1912 up to the date of his death, but they were just about the same. The average would be a little more than \$1,000 a month. I have stated that the expenses for 1910 were in round numbers \$13,500, but in this account I have not allowed an item of \$3,344 for discount on bills. The

instrument account was \$1,174. The discount account was simply this: If a man could not pay only so much, why what was left of his bill unpaid was put in the discount account. The Doctor would frequently receive sums less than he actually charged on his ledger, and would give a man a receipt in full, and in 1910 items on that account amounted to \$3,300 and some odd dollars. This was not included in the expense account of \$13,500. The books show the discount account was \$3,344; instruments, \$1,174; medicines, \$478; automobile expenses, \$3,116; general expenses, \$8,966. And for the year 1911 his books show discount account, \$4,701; instruments purchased, \$573; medicines purchased, \$418; automobile expenses, \$3,489; general expenses, \$9,098, and these would total \$18,280. And up to the time of his death the books show the discount account for 1912, \$3,775; instruments, \$249; medimines, \$187; automobile expenses, \$2,213; general expenses, \$4,869, and these would total \$11,295. I have had something to do with his books since his death, and know that his estate has been finally distributed."

## Re-direct Examination.

"During the year 1911 the Doctor was in Europe from June until September, so that he was out of his office four months of that year. The instrument account included anything in the way of appliances and surgical instruments that were used by the Doctor in his business, and this applied to the instrument account for the three years. The item

for instruments is included in my former statement of the expenses for each year. The Doctor purchased a new automobile in the Spring of 1910. The Doctor was away from his office for a month or six weeks in 1910. The discount account for the year 1910 was discount on bills earned in previous years, and the item of \$3,344 discount made in 1910 was for services rendered in previous years. The item of \$9,980, general expenses in 1910, does not include the automobile account nor his household expenses, and the household expenses were not included in the general expense account of the succeeding years, but this item of \$9,980 is a part of the aggregate item of \$13,538 for 1910, and the general expenses of the succeeding years is a part of the total expense heretofore given by me, and the instrument account is a part of the item of \$13,617 for the year 1911, and the same is true of the year 1912, and the total expenses given by me included all these different items excepting the discount items."

# O. C. THOMPSON, WITNESS FOR PLAINTIFF, TESTIFIED AS FOLLOWS, TO-WIT:

"I am in the grocery business at Riverton. There are three grocery stores at Riverton. There is a machine shop and just across the river from Riverton there is another little grocery store. In the year 1912 there was also a meat market there. I have lived there  $8\frac{1}{2}$  years and am familiar with the place known as the Riverton Crossing. (Witness shown plaintiffs' exhibit 1.) This picture

shows the crossing which I have referred to. My grocery store is not the one shown in the picture. That it owned by Mr. Rosenberg. I am familiar with the amount of traffic that passes over that crossing and have been familiar with it for 8 years, and in July, 1912, there must have been a rig passing the track every 15 minutes at least, and this condition has continued in the summer time especially on Sundays. It is that way all day long, and the same condition existed on week days for 2 or 3 years." Q. Do you know whether or not any accidents had occurred at this crossing by collision between travelers, vehicles or automobiles prior to July 25, 1912? (Objected to by defendant as irrelevant, immaterial and incompetent. Objection sustained. Exception noted for plaintiffs.) (Continuing.) "There was no fiagman at the crossing in July, 1912. (Mr. Hastings: It is understood that the objection made by defendant to the proof offered by this witness and also by Mr. East goes to the materiality of the substance of such testimony and not to the form in which I have asked it.)

# H. D. HANFORD, WITNESS FOR PLAINTIFFS, TESTIFIED AS FOLLOWS, TO-WIT:

"I reside in Seattle; am a civil engineer, which occupation I have followed for 18 years, and have lived in Seattle since October, 1899; left Seattle in November, 1902, and returned again in January, 1905, and have resided here continuously since. I

was the chief engineer in charge of the work of the construction of the tracks of the Puget Sound Electric Railway, which was then called the Seattle & Tacoma Interurban Railway. I have general knowledge of the Riverton Crossing, which is the crossing just South of the county bridge. This crossing is about 4 miles South of Spokane Ave." Q. Was there any discussion at the time of the location and building of those tracks, between you and the officers of the company, respecting the character of this crossing; whether or not as located it was or would be a dangerous crossing? (Mr. Tait: I object to that as irrelevant, immaterial, incompetent and certainly not supported by any allegation in the pleadings. Mr. Hastings: We allege that this was a dangerous crossing. The Court: That fact, whether it was a dangerous crossing or not, depends primarily on the surroundings and conditions rather than any conversation had with the parties. The objection is sustained. The court is going to rule that the conditions that were open and plainly visible you do not have to bring actual knowledge or notice to them the same as you would concerning some latent defect or danger, in which case this might be permissible.) Q. Do you know whether or not, Mr. Hanford, from your knowledge as an engineer and also the experience you had in laying out this track, whether or not the crossing there could have been constructed so as to have eliminated, or at least greatly reduced, the danger of this highway crossing? (Objected to by defendant.

Objection sustained. Exception noted for plaintiffs.) Q. Do you know whether or not there was a plan considered at the time these tracks were laid out and constructed across this crossing, by which a different method of construction of tracks could have been carried out and thereby reduced the danger to the traveling public in crossing those tracks at that time at that point? (Objected to by defendant. Objection sustained. Exception noted.)

# MRS. NELLIE M. RININGER, ONE OF PLAIN-TIFFS, BEING SWORN, TESTIFIED:

"I am one of plaintiffs in this action, and was the wife of Dr. Rininger at the time of his death. The Doctor left one child surviving him, whose name is Helen Dorothea Rininger, and she was 14 years of age on the 2nd of February of this year. She has a guardian. (PPlaintiffs offer certified copy of so much of the probate records of King County, Washington, that shows that A. S. Kerry is the duly appointed, qualified and acting guardian of said Helen Dorothea Rininger. The same received without objection and marked plaintiffs' exhibit 13.) "Each year the Doctor went to New York or to the Mayo Brothers. The Mayo Brothers are surgeons that I think are pretty well known in the Northwest. They are at Rochester, Minnesota, and are the owners of the Rochester sanitarium and hospital. I think the Mayo Brothers are considered the best surgeons, at least the Doctor considered them the best surgeons, in the United States, and each year

he would take his vacation and go either to New York City to take some special work or to the Mayo Brothers to take up some special work. I know at different times he took up different things. One time he went to take up kidney work and another time goitre—each time he went to take some special subject. Each year he took up something different. I don't know how long he was absent in the year 1910, but usually he was gone about 10 weeks or twelve weeks. In 1911 he was absent in Europe; was gone from the 25th of June until the 1st or 2nd of October that year. He was not absent in 1912. He had purchased two automobiles since the beginning of 1910 up to the time of his death. The Stearns auto was purchased the spring of 1911, and the other the year before."

# KENT BRODNIX RECALLED FOR FURTHER CROSS-EXAMINATION BY DEFENDANTS.

Q. You stated yesterday that during the 2 or 3 months prior to this accident you had passed over the Riverton crossing going in both direction, that is to and from Seattle? A. Yes, sir. (Continuing.) "It is a fact that in coming towards Seattle, the county road, as soon as it crosses the tracks, turns very abruptly almost at right angles to the North and comes on in toward Seattle. Just on the Easterly side of the track the turn is very short. After you get across the tracks coming in towards Seattle, the county road follows alongside the rail-road track all the way up to this bridge crossing the

river. I could not say how far the bridge is North of the crossing, but it is something like a quarter of a mile North of the crossing. I do not think the county road makes the same curve in towards the foot of the bluff that the railroad tracks do. I do not mean to say that the county road runs perfectly straight from the time you get across the tracks until you get up the bridge. It makes some curve in to the left as you are driving North and at no time are you very far away from these railroad tracks as you pass from the crossing up to the bridge." Q. Then as a matter of fact, before this accident you knew that the tracks did curve in towards the foot of the bluff North of the crossing, didn't you? A. I knew they curved, but the extent of the curve I had no knowledge of at all. Q. You said vesterday I think something about being able to see the tracks up near Allentown or in that vicinity, when you were back 50 or 60 or 75 feet from the crossing; did you mean to say that you could see the rails of the track that far? A. You could see some of the rails, not all of them. (Continuing.) "I cannot say that there is a board fence between the county road which runs along on the Easterly side of the railroad tracks and the railroad tracks and that on account of the curve in the tracks that board fence shuts off the view of the rails until you get very close to the tracks, because I don't know. I could not say how long before the accident it was that I passed over the crossing. It might have been within a week or ten days. I could not say what time

at all. (Q. by Mr. Hastings: One traveling along on the highway from the bridge towards the crossing by the side of the curve, opposite the tracks, would they be able to determine whether or not the car on those tracks was visible from the highway West of the crossing? A. No, sir. Q. What knowledge had you before this accident that the view of the West of the track, or the view of an approaching car bound Southward on the West track, was not visible after you passed 50 feet West of the crossing? A. I did not know that that was the condition.

# NELLIE M. RININGER, RECALLED, TESTI-FIED AS FOLLOWS, TO-WIT:

"The Doctor was born on March 7, 1870, which would make him 42 years and 5 months at the time of his death. (It is admitted by defense in open court that according to the American Insurance Mortality Tables that the expectancy of life for Dr. Rininger would have been 26-34 or 26 1/3 years at the time of his death.) (Continuing.) "At the time of the Doctor's death, his health was never better. His physical condition was good. His sense of hearing was very good; I always considered it much better than mine, and his sense of seeing was very good. He didn't wear glasses at all. He had obtained life insurance in the month of June previous to his death."

## PLAINTIFFS REST.

Thereupon the defendant, Puget Sound Trac-

tion, Light & Power Company, moves that the case be withdrawn from the consideration of the jury, and that a judgment of non-suit be directed in its favor on the ground that it had been in no way connected with the ownership or operation or management or control of the Interurban Railroad and that no negligence on its part had been shown. This motion was granted as to this defendant without objection. Thereupon counsel on behalf of the Puget Sound Electric Railway Company moved that the case be withdrawn from the consideration of the jury and that a judgment of non-suit be directed on the ground that no sufficient case had been made by the plaintiffs to go to the jury, as no negligence had been shown or proven, and for the further reason that it affirmatively appears from plaintiffs' own testimony that both Dr. Rininger and his chauffeur, who was in charge of the machine in which he was killed, were guilty of contributory negligence as will preclude their recovery as a matter of law. The Court: The motion will be denied, but I don't want to be misunderstood in the ruling I make. So far as the evidence concerning the negligence is concerned, the Court rules that there is sufficient evidence to go to the jury. So far as the motion has been interposed, and particularly argued on the question of contributory negligence on the part of those in control of the automobile, the court makes its ruling because the motion is not now to be considered by the Court, contributory negligence being a matter of defense, and the rule being that

the motion is only to be made at the close of the case for a directed verdict. (Exception allowed to defendant, with leave granted to renew its motion at close of the case.)

# F. G. WOODWORTH, WITNESS FOR DEFENDANT, TESTIFIED AS FOLLOWS, TO-WIT:

"My business is that of a draftsman; am employed as such in the office of the civil engineer of the Puget Sound Electric Railway, and have been so employed for 3 years. Have recently made measurements showing the distance between different points at what is known as the Riverton Crossing on the line of the Interurban tracks South of the city. I have examined defendants' Exhibit A for identification, and will state that it was made by me from actual surveys and measurements taken on the ground and is drawn to a scale of one inch to ten feet. On the drawing there are certain irregular curved red lines which indicate the different elevations of the ground. They are what we call the contour lines. They show the different elevations at different points along the side of the bluff, which bluff is to the North of the county road and West of the railroad. The parallel lines that cross the county road indicate the rails of the track. These represent the rails of the Southbound tracks and the red line between these rails indicates the center line of the right of way, and the center line of the present traveled roadway is indivated by those dashes as they cross the track. In measuring the elevations

of the bluff or embankment to the North of the county road and West of the tracks we assumed the rail of the South bound track as 100, then the first contour is 105 and up here next to this residence 37 feet above is X. I mean by saying that 105 feet is the first contour that at the red line marked 105 that would mean that that follows the course of the bluff 5 feet above the level of the tracks. Taking the central point where the county road crosses the tracks, the 5-foot elevation would fall approximately 50 feet from it. This red line here (showing) means that the elevation is 100. This means that the line bears along on the level West of the track; for a distance North of the county road and West of the tracks the land is flat and gets no elevation at all for about 30 feet. The building marked 'freight depot' is Southwest of the tracks or South of the country road. The width of the platform in an Easterly and Westerly direction is 16 feet and is about 6 feet from the track. The distance from the center of the Northerly end of that freight platform to the Southerly portion of the traveled roadway is about 10 feet. On the map here is a building marked J. J. Rosenberg's general merchandise indicated by shaded line, and extending in a Northerly direction from that is an unshaded line which represents the platform, which is 15 feet wide, and the distance from the Westerly edge of the platform to the first rail of the South bound track along the roadway is 90 feet. I have made computation to determine what the grade of the travel roadway

leading towards the track in a Northerly or Easterly direction and for about 30 feet it is practically level and from there on for about 300 feet it is about 4 per cent. I have marked here on this map "Warning Bell." This is an automatic bell that has six red lights on it and it is on the top of the steel post or cast-iron post. This bell is operated by a cut-in, a rail which is about 1,240 feet to the North, and would be operated by a train going South, and as the train went South it would cut the bell about 20 feet South of the crossing. This bell is located about 10 feet West of the track and about 25 feet North of the center of the county road. I only know the distance between this pole here on the platform and this one here (showing) which is 140 feet. I do not know the distance between the poles North of that. At a point North of the county road and directly West of what is parked 'passenger platform' there are two lines running substantially North and South intersected by cross marks, which represent fence line. These fences are between the roadway. This roadway is for the people. It is not for teams, because it is too steep there. It is a sort of traveled path for people living in that vicinity to go up and down on foot. There are two objects marked on the plat as 'residence' to the North of the county road and to the West of the track, which are approximately 155 feet West of the tracks and about 37 feet above the tracks." (Witness puts an arrow on the map to indicate the points of the compass.) (Continuing.) "As the county road crosses

the railway tracks to the Easterly side it turns Northeast and runs in a Northeasterly direction almost parallel with the railway tracks for a cut 100 feet North of the Riverton Crossing. I cannot tell the distance between the Easterly edge of the P. S. E. right of way and the Westerly edge of the county road. Between the right of way of the railway company and the county road North of the Riverton Crossing there is a fence. I do not know that this fence is on the boundary line of the county road."

## Cross-examination.

"The distance from the West rail of the West track to where the first red line intersects the South side of the macadamized highway is 23 feet, and the distance from the obtuse-angled platform of Rosenberg's store to the warning bell is 87 feet. South of the passenger station the map shows that the West boundary of the right of way is 43 feet West of the center of the track, and the East boundary is also 43 feet, and part of Mr. Rosenberg's building projects on the right of way. This map was made February 9, 1914. This map shows all of the houses in that section West of the crossing that you can see. There are other houses a little farther to the Northwest over the hill, but in sight of the track. There are also other houses a little farther West and in sight of the track. There is a garage apposite the county highway about 196 feet from the track, and there is a house right opposite it on the hill West of it. These checked portions at

each end of the place marked 'crossing' represent cattle guards. They are 9 feet wide. The passenger platform is 62 feet long North of the bell. On the map are the figures 31.50 which are on the black line extending West from the North of the cattleguard, which is 95 feet from the black line extending West from the North of the cattle guard, so that at a point 95 feet North of the cattle guard the edge of the bluff is 31 1/3 feet above the tracks, and as you go farther North the bank is higher. I did not take the elevations from there down. I just took the elevations there up; as far as it is on the map they are correct. This map purports to show a distance 250 feet North of the cattle guard. The little crooked oblong red line represents a depression. The distance of the first elevation line from the North line of the macadamized road is 20 feet from the West rail. The fence intended to be represented from the Northwest corner on the West right of way line is a board fence about 5 boards high. The side of the hill is just earth. There are some brushes on the side of it, not very many. I didn't notice any ferns or anything else on it in February. The distance between the West right of way and the next line is 15 feet, which is used for a foot path."

## Re-direct Examination.

"The figures 31.50 is the distance between the center line of the track and the old fence that runs along the bluff, and the figure 14 on the same line represents 14 feet from the center of the two tracks;

that is from one track to another. And the figure 10.5 is from the center line of the Easterly track to the fence between the county road and the track. And the figure 24 is from the fence that is between the tracks and the county road and the fence that runs along the river. That would be the width of the county road. The Westerly bank of the river represented on this map is not sufficiently correct so you could put your rule on and scale the distance, but it is approximately correct, and the distance from the East side of the county road to the West edge of the bank is approximately 12 feet. The distance between the line that I have indicated as the center line of th company's right of way to the fence along the Westerly side of the county road is 17.5 feet."

# ARTHUR L. ADAMS, WITNESS ON BEHALF OF DEFENDANTS, TESTIFIED AS FOLLOWS:

"I live in Tacoma. Am superintendent of ways and structures of the Puget Sound Electric Railway Company, and have been such for two years, and was familiar with the county road crossing at Riverton in July, 1912, and at that time about 400 feet South of the crossing was a sign reading, 'Caution, 300 feet to Railroad Crossing.' This sign was about 12 inches wide and had the caution sign of 7-inch letters and the '300 feet to Railroad Crossing' was about 3-inch letters. Up until August, 1911, this sign was placed on the Northwest side of the road.

About the 20th of August it was changed to the Northeast side, which would be on the right hand, side as you drive towards the tracks or Seattle. It was about the same distance from the tracks, that is 300 feet from the crossing, when it was moved over to the right hand side, and this sign was on the right hand side of the road on July 25, 1912, and had been there for about a year. There was also an automobile sign on the same pole. It had a symbol to indicate the railroad crossing, with 'Danger, Railroad Crossing,' and that was there July 25, 1912. On the electric bell post at that time was a crossing sign that was a cross; the sign itself was about 6 feet long and it said 'Railroad Crossing,' and above the crossing sign was the electric bell that operated every time the train approached within 1,100 or 1,200 feet, and the bell continued to operate until the train had crossed the county road crossing. On one arm of the cross board sign, attached to the electric bell post, was the word, 'Railroad' and on the other arm was 'Crossing.' It formed a cross. This would be on the left hand side of the county road as you drive toward Seattle, and approximately about 10 feet from the West rail. This bell would start to ring by the Southbound train when it got within 1100 or 1200 feet of the crossing, and the train would cut out the bell when it ran 20 feet South of the crossing or West of the crossing, or 20 feet on the right hand side of the county road. The North bound train would also set the bell in motion when it was 1100 or 1200 feet East of the

railroad crossing towards Tacoma and the Northbound train would cut it out about 20 feet North of the crossing. If the Soundbound train should cut the bell in and stop on the North side of the county road, the bell would continue to ring and would continue to ring until the train passed over the cut-out."

#### Cross-examination.

This sign that I have been testifying about is accurately shown in plaintiffs' exhibit No. 7. There is another sign on the other side of the road but none other at the electric bell point. This gong was set in motion by the passage of an approaching train or car and the car always sets the bell in motion. When the thing was first installed. I believe it failed once or twice that I know of. We had no trouble with the working of the bell in 1912, not to my knowledge. If the bell had not operated or had operated irregularly it would have been called to my attention. It would be the trainmen or the linemen who would usually call it to my attention, and if they failed to call it to my attention I would not know that it was not working correctly. The linemen themselves might make adjustments if the bell was not working correctly. I never knew it to happen that it did not work correctly. It usually comes to me. I consult linemen and send them to the job. It has been the rule when the bell was not working properly for the linemen or the trainmen in each instance to report it to me. I am sure of that." Q. What was the necessity of any such rule if it never

gets out of order? A. It very seldom gets out of order. (Continuing.) "If it got out of order the quickest way to get action was to report it direct to me. It very seldom got out of order. When it was first installed I think we had two occasions that it stopped, and it was installed in the Fall of 1910 or Spring of 1911. I do not recall the exact date. It has not been under my supervision since September or December, 1911, so that I did not have anything to do with it after December, 1911." Q. I understand by that, then, you would not know anything about the condition of the operation of the bell after that time? A. No, sir. (Continuing.) "It was when the bell was first installed that I had charge of it, and later I went into the engineering department, and it was turned over to the line department, and after December, 1911, if it got out of repair, it would be handled in the same way. I think the linemen took care of it after that. That is the linemen on the job."

Q. As a matter of fact it would not be reported to any one unless it was in a serious condition? A. I do not know how it was handled after I left the department. (Continuing.) "This sign out on the county road is placed about 300 feet West of the track and it says, 'Caution, 300 feet to railroad crossing.' This is on the South side of the track just as you get about to the top of the grade. An automobile club sign of warning is on the same pole at the present time. I am quite sure it was there in July, 1912. I first saw this sign saying '300 feet'

when I came into the employ of the company in July, 1910. At that time it was on the other side of the street, and I changed the location to the opposite side of the road in August, 1911."

Re-Direct Examination.

"The change was made under my direction. I saw it made. (Witness shown defendants' exhibit B). I recognize the location, and that is the exact location of this sign, which I have been testifying about. The other sign, "Danger, Auto Club of Seattle," is the other sign that I have referred to. I am not sure that this last sign was on the point shown in exhibit B on July 25, 1912, but I think it was there. I moved the caution sign over on the other side before July, but I had nothing to do with the automobile sign. I am sure that the caution sign shown in exhibit B was there on July 25, 1912. The same boards and the same painting shown in this picture were put there in 1911 and have not been changed since."

# MRS. AMELIA NELSON, WITNESS FOR DE-FENDANTS, TESTIFIED AS FOLLOWS:

"I have lived at Kent 7 years; am married, living with my husband. I recall the occasion of the automobile accident in which Dr. Rininger lost his life at Riverton on July 25, 1912. At the time I was on the Interurban train that struck the automobile, sitting in the first cross seat back of the smoker, which would be toward the forward end of the car on the right hand side; was sitting next to the win-

dow which was open. I saw the automobile before the collision. I think the train that we were on was about 25 feet from the crossing when I first saw the automobile. The auto was standing still. It seemed to be standing still right at the tracks. I did not see the automobile moving toward the tracks. It was standing still when I saw it. The train was moving. I could not say whether the auto was moving but it looked to me as if it was standing still. As we approached the crossing the electric gong was ringing. There is no doubt in my mind of that fact for the reason that I had a little girl with me and she was sitting next to the window when we got on the car—as children will, she wanted to sit next to the window, and after we had been going a ways she seemed to be frowning, so I asked her whether she did not want to change her seat, and she said she did. This girl was about 4 years old. I sat next to the window, and just as we were about nicely settled I happened to look out and I saw the auto, and I thought I would look closely to see if there was anybody in the auto that I knew, and just as I was taking a good look out that way, this electric bell rang quite closely to the car and for just an instant it kind of-well it-I didn't get frightened, but it startled me, and of course I just moved a little ways from the window, and of course I was anxious to see who was in the auto, but I never saw, because I saw the auto turn and at the same instant I saw two forms in the air. It was not very long from the time I first saw the autombile until it was struck by

the car because at the angle I saw it I think the auto was quite close to the tracks, but yet I supposed there were people standing waiting for the car, but I suppose it was about 25 feet, I should judge from where I was sitting. I should say the auto was about 25 feet ahead of me the first time I saw it. I could not tell at what rate of speed our train was traveling. I do not know. After the train stopped I decided to get off and go back and it seemed to me I walked probably 175 feet to the crossing. I got off about 15 minutes after the car came to a stop. When I got back there there was a train there. It was the local that followed the limited out of Seattle and was on the Southbound track. The electric bell was then ringing. I stayed there after the accident until the car that took us on left there. I don't remember just how long it was, probably an hour, as I cannot testify as to the exact length of time. I am not able to say whether the train on which I was riding blew any whistles before it reached the Riverton crossing."

## Cross-Examination.

"I reside about 2 miles out of Kent. My husband is a farmer and has been for 7 years. I do not now and did not then come to Seattle very often on the Interurban." Q. Now, as I understand you, as you were going along on this car, did you notice this bell ringing before or after you saw the automobile? A. I saw the auto first and as we were just passing that bell it attracted my attention because it seemed quite close—I had never noticed the bell so

close. (Continuing) 'It was just a few seconds after I saw the automobile before I heard the bell ringing. The window of the car was up. It was a warm afternoon. I did not hear the bell ring at Allentown. If the bell rang at any other station before reaching Riverton Crossing, it did not attract my attention. I changed my position with the little girl at Allentown and the train did not stop there, and did not stop any wheres else after we pulled out of Seattle to my knowledge. I think the train stopped about 175 feet from the crossing, but I am not a good judge of distances; when I say from the crossing I mean about the South end of the crossing right from the cattle guard, so that I should think that the train stopped from 180 to 190 feet South of the center of the street or about that. I knew Mr. Overlock was on the train at the time. He also lives at Kent. He was sitting on the other side of the aisle."

# W. H. OVERLOCK, WITNESS ON BEHALF OF DEFENDANTS, TESTIFIED AS FOLLOWS:

"I live at Kent where I have lived for 25 years, and I am a banker. I recall the accident when Dr. Rininger was killed as a result of a collision between his automobile and the P. S. E. trains at Riverton. At that time I was on the Interurban train that collided with the auto, and I was sitting near the front end about the East side of the car. I recall that the crossing whistle was blown before the train reached the Riverton crossing. It was blown just after we

left Allentown. Allentown is, I should think, about 1,000 or 1,200 feet from Riverton. The whistle signal that was blown was two long and two short blasts, the regular crossing whistle. I do not know anything about the electric bell ringing at Riverton. Prior to this time I had ridden two or three times a week possibly on the Interurban, for a number of years, ever since it had been running, and from that experience I think I have learned to be able to judge with reasonable accuracy the rate of speed that the trains were running, and I should think that this train was moving at the rate of 30 miles an hour when it approached the Riverton crossing, and as it approached the crossing I was conscious of the application of the brakes on the train. I could not say how far we were from the crossing but it was just a short distance, but the brakes went on and the whistles were blown practically at the same time. I do not mean the road crossing whistle, but the motorman evidently saw the auto and began to blow his whistle rapidly. I think we were possibly 40 or 50 feet from the crossing when I felt the application of the brakes on the car, and this quite perceptibly decreased the speed of the train but I could not say to what extent, but so much so that you could feel it all right enough and tell that the brakes had been applied. I should think the train ran a couple of hundred feet after it collided with the automobile. I got off the train and went back as soon as the train stopped. I think I was there about an hour, if I remember correctly, and while I was there

the local train came in from Seattle. I could not say whether the bell rang or not when it came in. I never noticed it. I own an automobile and have been driving it for 4 years, and am familiar with the county road at the Riverton crossing, having driven across it frequently in my automobile. I was familiar with the condition of the road the latter part of July, 1912. This road for 100 to 200 feet West of the track was dry and dusty. So far as I can remember it was so during all the month. I do not think there was any pitch or tar on it to make it slippery. The road was macadamized if I remember correctly either in 1909 or 1910, and the top was nearly all off, very little top left on it. The pitch would be on the top surface. That was nearly all gone. The weight of my automobile is about 3,000 pounds. I am familiar with what is known as a 4-seated Sterns machine. From my experience in handling my own machine, and knowledge of other automobiles, and my familiarity with this crossing I think on a dry day when the road was dry and dusty and as the road actually existed there in the latter part of July, 1912, a 4-seated automobile carrying 4 passengers, weighing between 4,500 and 5,000 pounds, driving toward the track from the Westerly side at 12 miles an hour, such a machine could be stopped within 10 or 15 feet." Q. Taking the same conditions, the same machine, as I have put in my other questions, if in stopping that machine it stopped at a point with the front wheels very near the first rail of the track, but not quite to

the rail, and marks on the ground show that the rear wheels had skidded from 35 to 40 feet, that the rear wheels had locked and skidded along the road for 35 or 40 feet, at what rate of speed, in your judgment, was the automobile traveling when the brakes were applied? (Objected to as irrelevant, immaterial and incompetent and on the further ground that witness has not shown himself competent to testify and also assuming a state of facts which has not yet been proven. The Court: Objection sustained on the latter ground.) (Mr. Tait: I wish to state this: Mr. Overlock is very busy; so far as the element contained in the question relative to the distance of the skidding, I will promise the court that I will introduce that proof later, but I cannot put my witnesses all on at once. The Court: With that understanding the objection will be overruled and the jury instructed that unless Mr. Tait introduced evidence that there were marks on the ground to show that the rear wheels skidded from 35 to 40 feet they will wholly disregard the evidence the witness may give. Exception for plaintiff). "I should say at least 30 miles an hour."

# Cross-Examination.

"I don't think I ever have driven an automobile that weighed 5,000 pounds. I have driven an automobile with a 60 horse power engine, it being a Winston. I never had any experience in driving a Sterns machine. The machine that I am accustomed to driving weighs 3,000 pounds and driving this ma-

chine at the rate of 12 miles an hour, I can bring it to a stand still in 6 feet, even if I had 4 passengers in it. If it were running 15 miles an hour I could bring it to a stand still in 10 feet. There was no pitch at that point in the road at that time. I was there that day. I saw where the car had slid, and there was no pitch. The natural curiosity of the human race led me to examine the place where the car slid. I saw the tracks where the car had slid in the dust. I think both hind wheels were on the macadam road. So far as the road was concerned at that time there was very little difference. You could not tell whether it was on the macadam or on the gravel road. I think that the marks of the skidding of both hind wheels were on the macadam but could not say for sure. After the accident I saw the automobile and it was standing right along parallel with the track, perhaps 6 or 8 feet from it headed North. The rear end was backed up pretty close to the freight station 12 or 15 feet from it, I don't remember exactly. I think the car was turned nearly around when it was struck and was parallel with the railroad track which would make it facing to the Northwest if the railroad track is headed Northwest, and was 8 feet from the track. I think all 4 wheels were all right. I never paid much attention to the grade. I did not examine the pitch, I was familiar with the road without examining it at that time, and it was my knowledge with the road before that that leads me to say that there was no pitch on it; so that as a matter of fact I did not ex-

amine the pitch at that time. I knew the condition of the road as I traveled it every day practically with my automobile. I got on the Interurban at the station with my daughter, who was seated with me in the same seat, and we were on the right hand side of the train going down. I do not remember whether the window was open, but think not. I do not remember what seat I sat in but it was near the front. I do not remember who sat in front of me or who in the rear or who was across the aisle. I suppose I heard the whistle blow when we were at the Meadows, but I don't remember whether they did or not. I don't remember whether I heard the whistle when we were at Duwamish, and I don't remember whether I heard the whistles when we were at Allentown, but I remember about the particular whistles because of the accident; I have talked to no one about the whistles blowing. I think today is the first time that I have told any one about the whistles blowing." Q. How in the world did they come to subpoena you as a witness if you did not tell them until today? A. Mr. Tait asked me several days ago in regard to it. (Continuing.) "I told Mr. Tait that I had heard the whistle. These whistles blew, I think, after we left the Allentown crossing. I am led to that conclusion because they usually blow for the crossing." Q. Do you have any independent recollection now that they blew before or after they passed the crossing—do you? A. Well, I would know. I should say yes, that they did. Q. Why do you say that? A. On account of the accident, recalling it to my mind that the whistles blew. (Continuing). They might have blown before they passed Allentown, and these might have been the whistles that I have in mind. I do not remember whether I was engaged in conversation with my daughter or not. I was not reading my paper. I suppose the car was moving 30 or 40 miles an hour when we passed Allentown. I should say it was about 40 miles. It is possible that it might have been 45 miles. It is possibly true that when a car gets up to a speed of about 30 miles an hour that a change of four or five miles is hardly noticeable, and it is probably true that when one is riding on a car and having no particular object of measuring distances by, it is an easy matter to be mistaken as to the rate of speed of a car, and it might be that I have not accurately estimated the speed at which the car was approaching the Riverton crossing, but I should think it was running 30 miles an hour, although it might have been 35 miles. I don't think it was 40 miles. I did not adopt any means of measuring the rate of speed. I don't remember whether I was watching the objects on the outside or not, and the only means which I had to determine the rate of speed was the fact that I was sitting in the car and it was going along rather rapidly. I don't remember that I was watching objects on the outside. There is one thing in my mind now that definitely assures me that this whistle which I heard blown was after we passed Allentown, and that is the length of time between them blowing that whistle

and blowing the others. What I mean by 'the other whistles' were those that were blown when we came in contact with the automobile." Q. How long a time was there between? A. Just a short time. Q. How many seconds or how many minutes? A. Oh, it was not minutes—it was seconds. (Continuing) "Perhaps 30 seconds. I do not now remember what I was doing after we left Allentown and before we reached the crossing. As near as I can remember it was 30 seconds in the interim. These things all take a little time. These whistles were not blown before we reached the Allentown crossing. I have owned but one automobile. I have had no experience in running any other to amount to anything. I have driven other cars, but not as an every day practice. The engine on my machine is 30 horse power. My testimony with reference to the distance at which an automobile may be stopped is based entirely on my own experience in handling my own machine."

#### Re-Direct Examination.

"When I went back after the accident, I saw the marks on the ground where the Rininger machine had skidded. I did not measure them but I should say off hand about 30 feet was the distance that the machine had skidded, something like that. If a machine had skidded 30 feet with wheels locked, I should think it could not have been going less than 25 miles an hour."

#### Re-Cross Examination.

"I think the skid marks were about 30 feet long as near as I can remember. I did not step it off, just looked at it as a man naturally does. I think that a machine that weighs 5,000 pounds and had 4 passengers in it and the rear wheels locked and skidded 30 feet, must have been driven at 25 miles an hour. I have never had any similar experience, but have had experience with an automobile where the wheels were locked and it skidded, as my wife and I were always experimenting with our automobile to find out how quickly we could stop it and how much we would skid at a certain rate, and my machine weighed 3,000 pounds, and we passed part of our time with my machine to see how far it would skid with the wheels locked. We did this once in a while as we would get to talking about it. I never ran my machine at 25 miles an hour and suddenly lock the wheels to see how far it would skid, but have run it at 15 miles an hour and locked the wheels to see how far it would skid, and it would not skid at all at 15 miles an hour. I never ran my machine at 20 miles an hour and then locked the wheels to see how far it would skid. I have run it at 10 miles an hour and locked the wheels to see if it would skid and it would not. If my machine weighed 5,000 pounds I do not believe it would skid running at 10 miles an hour." Q. So, as a matter of fact, you have never seen any of the results of a machine weighing 5,000 pounds skidding with the wheels locked, have you? A. No sir.

# CHARLES E. HILL, WITNESS ON BEHALF OF DEFENDANTS, TESTIFIED AS FOLLOWS:

"I live in Tacoma and have resided there 30 years, and am a lumberman. I was on the train that collided with Dr. Rininger's automobile on July 25, 1912. I was seated either in the second or third seat from the rear next to the window on the right hand side going South. I did not see the automobile before the collision. I could not say whether the road crossing signals were given or not. I did not hear the electric bell ringing. After the collision, I think the train ran about 200 feet before it came to a stop, probably a little more; that is 200 feet South from the cattle guard. I got off the train and went back. I saw some skid marks on the road." Q. For about what distance did they show on the ground? A. 25 or 30 feet. Q. And they came down to within about what distance of the track? A. I could not say definitely as to that, I would say probably 8 or 10 feet. I should think about the length of the machine. (Continuing) "The road was dry. I could not say particularly as to whether there was any dust or loose sand or anything of that sort on the road. I should not think that there was any pitch or tar on the road; I don't know, I didn't see any. I stayed there until after the local followed from Seattle, and came down to the crossing. I do not recollect whether the electric bell rang or not when this train got in."

Cross-Examination.

"The marks of the skidding were from 25 to

30 feet I should say. I didn't measure it. That is my opinion. I did not step it off. The skid marks were visible as to both wheels. It is my recollection that both wheels had skidded on the macadam; I feel positive of that. I saw the automobile when I went back. In locating the machine on this map as to where it was when I went back I will say it was at the point marked X in lead pencil. The front end of the car was turned toward the freight platform. There was considerable excitement at that time. Dr. Rininger was found to be killed and the two girls injured. I presume there was a good deal of talk among the people. I did not talk much with anybody. I made no attempt to measure the skid marks. I could not say whether the car was standing over the skid marks or not, but I think not. It was a quite warm afternoon. I did not pay any particular attention to the appearance of the surface of the road as to whether it was pitchy or not. I sat in the second or third seat from the rear of the train. I don't think the window was up. I was engaged in conversation. I took no count or measurement of the poles between the car after it stopped and the freight shed. The car might have been as much as 300 feet South of this crossing when it stopped."

## A. L. BROWN, WITNESS ON BEHALF OF DE-FENDANTS, TESTIFIED AS FOLLOWS:

"I live in Seattle part of the time and then in Thurston County. Seattle has been my home all my life. At the present time I am farming. Was never in any way connected with the P. S. E. Railway. I was on the train that collided with Dr. Rininger's automobile when he was killed; was seated in the middle section, the third or fourth seat at the right hand side of the car next to the aisle. I think the window at the end of our seat was closed. The crossing signal was blown before we reached Riverton. Q. At about what point? A. After passing the rock quarry. Q. And that would be how far North of the Riverton Crossing? A. I never measured it, but it is only a few minutes' ride; just a short distance, should say a quarter of a mile. Q. Do you know whether or not this electric gong was ringing as the train passed over the crossing? A. I am not positive, I think it was. In riding in a car at least I never have been able to hear a bell until the car gets almost perhaps about to where the bell is located, and then you will hear it. (Continuing) "I think it must be because of the noise of the train. I have noticed it before and since then. It always seems to be the case. I am not able to tell the rate of speed the train was moving as we approached Riverton. I got off the train and went back. I was on the ground when the local came in, and as it came in the electric bell was ringing and rang while the local was there as it came in on the track. The local stopped I should say 50 or 60 feet North of the crossing, and the bell rang until it got off the track again. After remaining there a few minutes it back-tracked and then came in on the East track. I noticed some heavy automobile skid marks. I cannot tell how long they were. After the train gave its crossing whistle, I noticed a perceptable decrease in speed shortly after, or almost immediately after whistling the 2 long blasts and the 2 short blasts. I felt a slackening of the speed as the brakes were applied. There was a jar when the collision occurred. There was just a few seconds between the time that I felt the brakes applied and the jar of the collision. The train stopped South of the crossing abreast of the third telephone pole; I should say about one-third of the car was ahead of the pole, that is, South of the pole and two-thirds of the car was North of it. There is a telephone pole standing in the Northerly end of the freight platform, and counting that as the first pole I counted two other poles in addition."

### Cross-Examination.

"I counted the poles at the time. Including the one abreast the car and the one at the station there was 3 posts. I got off the car and went back. The automobile was standing then pointed up hill toward the road leading up the hill, leading to the West. It would be a little bit slanting. The front of it was mostly knocked to pieces, but what was left of it was slanting a little more towards the store, and if the road runs West then it must have been pointing West. I will indicate upon this map where the machine was standing as "B." It was on the edge of the highway at the point marked "B." If the arrow

on the map indicates the North, the automobile would be pointing pretty nearly North, that is it would be pointing a little off to the West. I heard the whistle blow after we passed the rock quarry and heard it again blow when we struck the auto, but I observed no whistles blowing between that time and the time that I heard them up at the quarry. I was riding near the center of the car and near the aisle engaged in conversation along about that time. I was looking past the party I was talking to, and knowing I was coming to a crossing I was looking out seeing who would be there or what would be there. The window was not open. I would say when I got back to the automobile after the accident that it was about 30 feet from the track. Q. You saw it there several minutes—practically all the time you were there? A. I looked at it several times, yes. If one man said it was 8 feet from the track he must be mistaken. The bell was ringing all the time that the local stood there on the track. I heard it ring except when I walked up the track a little ways. The left part of the front of the automobile was all dilapidated. It looked as if it had been in a collision, pretty much knocked to pieces. The rear part of the machine looked pretty good. Everything was stove in in front. The left front wheel I think was broken to pieces but am not positive, although I looked at the machine. I don't think the condition of the machine would have made any greater impression on my mind than the rate of speed when I was sitting in the seat talking to my companion.

I was not paying much attention to the speed we were going. I didn't know it. I knew we were slackening up. I do not remember the whistle blowing at Duwamish or at the Meadows. When I say I felt the brakes applied it was the usual feeling that one feels on a car when there is a sudden slackening of the speed. The brakes were applied some distance back from the crossing. It was very shortly after the whistles were blown. They were applied very shortly after I heard the whistle."

#### Re-Direct Examination.

"After the accident I examined the forward end of the train to see what, if any, damage had been done to it. The party that I had been sitting with in the car and myself walked forward in the car after the accident, and we took particular note that the car was standing oposite the third telephone pole. We, also, noticed that the front end of the street car was not damaged at all. The fender was not even broken or seemed to be out of place in any way, shape or form, but that the front step on the right hand side of the car was jammed and wrenched out of place and jammed to pieces. It was the front step and was broken off from its hangings and torn to pieces. They could not repair it then. The train passed on without repairing it. It was just hanging. It was Mr. C. E. Hill with whom I was talking, the gentleman who just testified. It was the step that was broken off and hanging down. The sides of the step were of sheet iron with wooden

treads, and the step had been so wrenched that one side had been completely pulled loose from the car and was hanging down pretty near to the rail. It was the forward step on the right hand side that was struck. The pilot or cow-catcher was not touched or molested and the fender was not broken at all, just the corner of the pilot was jammed a little bit."

## PERRY SUMMERFIELD, WITNESS ON BEHALF OF DEFENDANTS, TESTIFIED:

"I reside on and am the superintendent of the poor farm of Pierce County, and was a passenger on the Southbound train that collided with the automobile in question. I was seated in the rear seat on the right hand side; that is, I was lying down in the seat as much as I could; I was very sick at the time, and was in that part of the car known as the chair car division. I heard the road crossing signal just a minute or so before the accident happened, and then immediately prior to the accident. The first signal was 4 blasts. I would not want to state the exact distance North of the crossing I heard it. We were North of the Riverton Crossing when I heard it, a very short time, a minute or so before we reached Riverton. I could not state whether we had passed Allentown when this signal was given. As our train passed over the roadway, the electric bell at the crossing was ringing. I noticed that very distinctly. My estimate, which was made from looking back that distance, was that the train went

South of the crossing from 250 to 300 feet. I did not get off the train and go back, as I was very sick. The local train came down behind us a few minutes after the accident, which stopped a little ways back. It stopped before coming to the crossing; it did not cross over the roadway, but stopped back of the highway quite a distance back of that, 200, 300 or 400 feet. The electric bell was ringing while that train was standing back of the crossing. I could hear it very distinctly, and I was 200 or 300 feet away. The bell rang quite a while; I could not state how long, as that train stayed there quite a while, and it was ringing all the time. At the time the 4 blasts were blown the train was running along at its regular schedule rate. I did not notice any unusually high rate of speed."

#### Cross-examination.

"I was sick on this trip, lying back as much as I could in the chair. It was an upholstered chair in the parlor car division. There was nobody with me. There were people all around me, but I did not pay much attention to them. I was not engaged in any conversation. I could not state whether the window was open or not. I remember when the train crossed the Duwamish Bridge. I could not state whether it slowed down when it crossed this bridge or not. I noticed the whistle blowing the regular blast and then so quick afterwards came these 4 or 5 short blasts and I knew there must be something wrong, and that was what called my attention to the blasts. I heard the rapid whistle when the acci-

dent occurred, and before that I heard another alarm. I could not state whether this other alarm that I heard was before or after we crossed the bridge. It might have been just before we crossed it. I could not state positive whether there was any blasts after we crossed the bridge and before I heard the rapid whistle at the crossing. I heard the bell ringing at the crossing after the whistling, as we went by it. This was the first time I heard the gong." Q. You think the bell which you heard was the gong on this post or the gong on the car? A. Well, I thought it was the gong on the post. Q. But it might have been the gong on the car? A. It could have been. (Continuing.) "It could have been the gong on the car, perhaps, but I was very positive it was the gong on the post. I think so because I could hear it very plain as I went by, and after the car had stopped, then this bell had stopped. I feel positive that the gong that I heard ringing was not the gong on the car. I saw the automobile at a distance by looking back; I did not see it before it was hit. I think the train ran about 200 feet beyond the station before it stopped, but I would not be positive of this distance. There were windows open at that time on that side of the car, but I could not say how far they were from me,-just a few seats ahead some were open, and some were shut. I could not state how many windows there were in that compartment. I did not notice any difference in the speed of the car after it left the bridge and before it reached the crossing."

## B. F. ALDRICH, JR., WITNESS FOR DEFEND-ANTS, TESTIFIED AS FOLLOWS:

"I am a photographer by profession and live in Tacoma; have been such photographer for 23 years; own my own studio, and make a specialty of photographic views and commercial work." (Defendants' exhibit "A" offered and admitted in evidence without objection. Witness shown photographs marked for identification Exhibits B, C, D, E, F, G and H.) (Continuing.) "I took these views myself on July 27, 1912, and they are correct representations of the scenes they purport to depict, and they were taken at the Town of Riverton, and they show the different views of the Riverton Crossing and the county road and the tracks of the Interurban." (All of the aforesaid exhibits were offered and received in evidence as Exhibits B, C, D, E, F, G and H without objection.) (Continuing.) "In taking Exhibit B, the camera was situated 367 feet West of the West rail of the Southbound track in the center of the county road, and it was 60 feet West of the sign reading, 'Caution, 300 feet to railroad crossing.' The sign is 304 feet West of the West rail of the Southbound track." (Witness writes the distance on the back of the picture between the camera and the track.) "When Exhibit C was taken, the camera was located 64 feet West of the West rail of the Southbound track exactly in the center of the county road." (Witness writes these distances on the back of the picture.) "This Exhibit C is looking North and shows a railroad

coach up the track, and the distance from the front end of that railroad coach was 1170 feet from the center of the crossing. I made the measurement myself. Exhibit D was taken in exactly the same location, and shows a railroad coach looking towards the North from the crossing. In this picture the train is 890 feet North of the point where the camera was or center of the crossing. In taking Exhibit E, the camera was exactly in the same location as in the previous two views and this shows an Interurban train which was 783 feet North of the crossing. In taking Exhibit F the camera was located in exactly the same place as the other pictures. 64 feet West of the West rail of the Southbound track, facing in a Northerly direction, and shows the train 360 feet North of the crossing in the most obscure point of the curve from that point of view. The coach was stationary while the pictures were being taken. When these pictures were taken a special car was sent out for that purpose and was moved from time to time for the purpose of determining the point where it would go most nearly out of view. Exhibit F shows the coach as it appears at the point where it would be more nearly obscured from view as it would come around the curve at a distance of 64 feet from the west rail. The coach is represented in this picture by the top of the coach and a little of the side and the end just to the left of the pole and between it and the bank. Exhibit G was taken exactly in the same location as the previous views. The train showing in it is 240 feet

North of the crossing. In Exhibit H, the camera was in the motorman's vestibule of the coach and taken at a distance of 550 feet from the crossing, which was the distance between the vestibule of the coach looking South toward the crossing. This picture also shows an automobile in the location of the camera when it took these previous views. I had the automobile stand in the same place for the purpose of this picture and am marking a small cross directly above the automobile."

#### Cross-examination.

"I operated the camera and arranged the distance shown in Exhibit C by pointing out the location and sending up a party with the train and having the train stop at just such a point, and afterwards measured the distance from the center of the crossing,—the car remaining at that point while we did the measuring, and I did the same thing with reference to the next view when the car was moved down nearer the crossing, and then I went back to the camera and took the picture and then measured the distance again, which was done with a steel tape, one of the parties helping. He is not here in the court room. We were a good share of the day taking these pictures, and other trains came along while we were there, which interrupted us at times, but we were able to secure the locations and got the views and measurements before we would allow the local to pass. Exhibit A is one looking South from the crossing; I manipulated the camera and that

took it. I stationed the automobile at that point before we went out, where it remained until we took the view. These were taken under the direction of the P. S. E. Ry."

#### Re-direct Examination.

"In taking the views where the camera was located in the roadway, the lens of the camera was just about 5 feet 4 inches above the level of the ground, and in taking the one view which looks South toward the crossing from the motorman's cab the elevation of the floor of the car was in addition to the 5 feet 4 inches from the track. I was then on the platform of the car and I got the elevation of the camera on the level with my own eyes."

## J. O. ROSENBERG, WITNESS FOR DEFEND-ANTS, TESTIFIED AS FOLLOWS:

"I live at Riverton, and have been living there two years less one month; am a grocer, running a grocery store right there at the Riverton Crossing, and have been running it since March 1, 1912. I remember the occasion of the collision between the Southbound Interurban train and Dr. Rininger's automobile. Just prior to the time of the accident, I was standing below the macadam a little West of the platform that leads into the store talking to Mrs. Springer, who testified yesterday. I should judge I was 70 feet West of the track, probably a little less, and was facing North, partly Northwest, while talking to Mrs. Springer. She was facing Southeast. Her back would not be toward the crossing;

her left side would be towards it. I saw the Rininger automobile as it passed. I should judge the machine traveled between 15 and 20 miles an hour, and that was about 75 feet from the track. watched the automobile continuously until the accident with the exception of just about the instant that the top of the automobile passed out of my view, and at that instant I intercepted a view of it from underneath the platform. It passed out of my view because my head was on a level with the grade and the automobile coming down the grade and my head being about level with the road was sufficient to obstruct a part of the view of the machine." (Witness' attention is called to Exhibit B.) (Continuing.) "It was taken West of the crossing. This is the platform leading from my store to the road. This is the bottom of the platform and the upper line is the railing on it. I was standing on the West side of it. The edge of the roadway slopes downward toward my store at an angle of about 45 degrees, and I was standing so that my head was about on a level with the roadway. The platform that leads into the store and also grade are what caused the automobile for a moment to pass out of my view. The automobile coming down the grade would probably be 2 or 3 feet lower than my head." (Witness shown Plaintiffs' exhibit 1.) Q. Now point out on that (exhibit 1) where you were standing when the automobile passed you. A. I was standing down here just about this point at the place marked "B," and it was this bridge or platform that

shut out my view as the automobile passed by. then stopped down and looked underneath the platform. There is an open space underneath the platform and I had a full view of the track from there. After the automobile passed and I had gotten down to where I could stoop down and look under I could not see the whole body of the auto, just the end part of the machine, that is I got a glimpse of it, and at that moment the collision had occurred, so that I just saw it swinging through the air." Q. Do you know whether or not the automobile kept up the same rate of speed or did it reduce its speed before the collision? A. Yes, as it partly passed out of my view it appeared to me as if it reduced its speed to some extent; that is, it had the appearance. Just at what distance it would be at that time I could not say. (Continuing.) The cause that induced me to stoop down and look underneath the platform when my view of the auto was obstructed was that I heard an approaching train, and heard the whistle and the rumble of the train. The last whistle that I heard was 4 blasts, the regular crossing whistles that railroads always give,—2 long, a short and a long one. I live at the store and had been living there for about 5 months before the accident, and was able to tell approximately from the sound of the whistle about how far the train was away, and I should judge the last whistle I heard was blown when the train was 200 or 250 feet away. This last whistle was the last one of the 4 blasts constituting the road crossing whistle. I did not hear any other whistle

after that. I think the train was North of Allentown, as she rounded the quarry curve when I first heard the rumbling. Allentown is approximately 600 or 700 yards, about 700 yards from the Riverton Crossing. Previous to hearing the rumbling of the train and the 4 whistles, and while I was conversing with Mrs. Springer, I was a few feet farther West than what is indicated by R on the picture there. When I first heard the rumbling of the train, I was about 6 or 8 feet West of the spot indicated on the picture and I heard the rumbling of the train continuously from the time that I first heard it North of Allentown until it reached the Riverton Crossing. From the length of time I have lived at Riverton I have noticed at what distance along the county road West of the track you can hear the rumble of an approaching train coming from the North. It depends on weather conditions. The specific distance that I am positive of noticing is at the intersection of a road about 600 to 800 feet West of the crossing up at what is called Thompson's store or Mr. Engle's residence; I have at several times heard the approach of the trains and the electric alarm bells ringing from that point. The distance at which you could hear the rumble of the train would depend upon atmospheric or weather conditions to some extent, and I know of no condition except a storm or a disturbance that I could not hear the approaching train at the point indicated. As the automobile was approaching the railroad track, the electric alarm bell was ringing." Q. How

far away from the railroad track was the automobile when you first noticed the electric alarm bell? A. I hardly know how to answer that, Mr. Tait, because I knew at the time of the train approaching that the bell was ringing and how far the automobile was from the track when I first noticed it; it is hard for me to indicate, but I heard the bell ringing while I was talking to Mrs. Springer." (Continuing.) "I heard the bell ringing before the auto passed. At the moment of the collision the automobile was headed Easterly. The tracks there do not run directly North and South, and the automobile was headed at right angles toward the train. When I first saw the train it was at the moment that it hit the automobile. I did not see it before, but saw it just at the moment that the two bodies met together. After the collision, the train came to a stop slightly ahead of the third pole South from the crossing. In counting the third pole I think I am safe in saying that I counted the pole standing in the North end of the freight platform near the side of the road, because the impression is fixed in my mind that it was the third pole and the front end of the car projected about 15 or 20 feet South of the third pole from the crossing. I have daily ridden over the Interurban line up to within 3 or 4 months of the time of the accident, and in making these daily rides I gained such experience as would enable me to estimate with a reasonable accuracy the rate of speed at which a train was running, and I should say that when I first saw the train at the time of the collision it was

running between 30 and 35 miles an hour. The surface of the county road on the West side of the tracks at the time of the accident was dry, newly sprinkled with screening. By this I mean that screening is a by-product from the rock crusher after the rocks are taken out, and contains the floury part of the rock, anything that passes through a half-inch to five-eighths mesh, and that is put on the surface of the road to absorb the liquid asphalt as the road is resurfaced. They had faced the road there almost daily until all the liquid oil was taken up by the crushed rock or the screening. They had men going over the road sometimes daily and sometimes every second or third day. The crew that repaired the road was working up above and sometimes they refaced that road every day, and other times four or five or six days apart, according to the need. On the afternoon of the day on which the accident occurred, the surface of the road was dry and dusty with a grey surface indicating that it was dry. I do not remember that there was any pitch or tar on the surface. I noticed after the accident marks on the road to show that the automobile had skidded. I saw the skid marks from the tires of the machine which had raked off the greyish surface on the road and had the appearance as if it burned the surface of the road by taking off the grey surface and leaving the brown skid marks on the road. It was asphalt under the brown skid marks, -asphalt and rock dust combined, which showed some tar and pitch to some extent, but not a liquid

pitch. This preparation of asphalt is the same kind of material that is used on the streets of the city, but is not as hard as the asphalt covering used in the city. It is a different process. I was requested to make a mark on the road and to drive a spike showing where the skidding began, and I took a line mark from the store window to a cross fense on the Interurban right of way, a fence that goes across the right of way from the South end of the platform to the extreme West boundary of the right of way, and I fixed my line of vision on that fence, and had a perpendicular line on the road about where the skid started, which I had obtained by sighting across the road from a point on the one side to a point on the other, which I have just described, and I have measured the distance from this line as fixed by me down to the tracks, which is 39½ feet."

#### Cross-examination.

"At that time I was standing West of the platform and South of the roadway on the ground. I just stood there and had this conversation with Mrs. Springer. Before she came along I was going down below the platform for some purpose connected with the store; I don't remember just what. I was not under the platform when talking to her, but just West of it about 20 feet, and 6 or 7 feet West of the grade, and Mrs. Springer was turned toward me, but standing North of me. We stood almost abreast of one another while we were conversing. It may have been a matter of a couple of

minutes that we talked, just an ordinary conversation in regard to her husband, as he was away at the time. I do not remember that there was anybody with Mrs. Springer. Trena Block was not with her that I remember. It was after my conversation with Mrs. Springer that the automobile went by, perhaps a half minute or just a matter of a few seconds afterwards. As near as I could judge, the auto was in the middle of the road and I think it was going at a speed between 15 and 20 miles, nearer 20 miles. After it passed us it had the appearance of reducing its speed just as it passed out of my sight. The next time I saw it it was just at the moment of contact between the two. I could just see the end of the machine. I did not see it after it passed out of my view until the accident. I stated yesterday that I looked through and saw the top of it, but there is also an intervening space of time in changing the position from above the platform to underneath the plat-form, and in the intervening space of time I had lost sight of it. It was several seconds after it passed me before the accident occurred. I saw where the auto skidded. The roadway at the place where it skidded had recently been re-surfaced; by that I mean that each year, most of the time, what they call scarifying the road; they tear up the old surface and then they place a substance of asphalt and screening on the top to make a new binding—it is a sort of asphalt, so that there had been recently a new surface of asphaltum placed on this and that covered with rock screening.

This preparation of asphaltum that is used is similar to what we see on the streets in the city, but it is of a different density. It is softer. It is never as hard as the asphalt in the city, as I have not seen them use it with the same density. The warm sun had the effect out there where they were resurfacing of producing what the road men call sweating, due to the expansion of it forcing the asphalt at times up to the surface of the road, which softens it. This was a warm afternoon, but I don't think that the asphalt was softened at that time at that place. The sweating of the road through the sun raises the asphalt to the surface, and is done very frequently, and then from time to time as the sweating shows on the surface the workmen sprinkle more and more of the screening and rock dust on until such time as all the old oil that comes to the surface is absorbed in the rock, and that causes a hardening; consequently the younger the road is the more recently it has been screened, the softer it is the more rock dust is put on, and as more carbon is put on the harder it becomes. When I stated that I saw where the skidding of the wheel had burned the rock-bed, I meant by that it had burned through the more recent rock dust covering of the upper surface. The upper covering was rock dust screening,—a part loose and part hard. It did not scrape away the asphalt covering. It could not do that. I could not give the distance where the skidding began with reference to the platform, but it began to skid East of the platform; but I could not say how far East. I did

not drive a spike down where it began to skid, although I was asked to do so by one of the company's officials. I made one measurement of the skidding that afternoon and also the following day. The first measurement was made toward evening; I could not state exactly what time. I was able to make the recent measurement by the same mark that I used at that time. There had been nothing changed, either the buildings or any of the company's property. Consequently the same marks are there today. I fixed the line on the crossing fence on the company's right of way extending from the platform to the West end of what is supposed to be the right of way. That fence should run from the end of this platform up to the boundary of the company's right of way (showing on the photograph). point on the fence from which I sighted was half the distance between the fence post and the corner post of the fence. I sighted from the East window East of the door of the store, which is about 30 inches wide, and a line from this window to the point on the fence would hit the rear end of the skid mark, which was 39 feet from the track measured about the middle of the highway to the west rail on the Southbound track. The auto was right at the track when it was struck near the middle of the traveled highway. I do not think it was any nearer the South cattle guard than the North cattle guard when it was struck, still there is a possibility. If it were nearer the South cattle guard that would make the distance from my line of measurement

longer, because the angle of vision from the store to the cross fence is on an angle with the road and the nearer and closer the store I would draw the line the longer would become the distance to the rail. I do not think that if the skidding were toward the cattle guard instead of toward the center of the street that it would be any shorter. It is possible, but I don't think so on account of the angle of the road. The Interurban road and the county road are not running at right angles by this map. Defendants' Exhibit A is a correct representation of the conditions there. The rail or track at the cattle guard is nearer to my platform than the middle of the road. I will fix the point on this fence shown on this plat from where I sighted. There is about a 5-foot space between the corner post and the other posts of the fence, and the point is half way between, or two feet and a half from the corner post. It is a board fence. The window from which I sighted is shown on this picture and I will put a cross at that point with lead pencil, and a line drawn from that point to this point on the fence passes the West end of the skidding. Defendants' Exhibit F shows the fence that I refer to, and I will put a mark on Exhibit F on the fence as indicating the point referred to. Defendants' Exhibit B shows my building. Plaintiffs' Exhibit 1 also shows correctly my building, and the window which I spoke of is the window in the front of this building, which has a square face. I could not state how long the automobile was, but the front wheels were almost on the rail

when it was struck. I could not see the distance from where I was, and the only way I ascertained that the wheels were near the track was by observation afterwards from the skidding of the wheels. I did not see whether or not the front wheels of the auto were on the track when it was struck, but my statement is based on subsequent observation. After the accident the machine was from 8 to 10 feet West of the rail and right angles from the county road facing North. The county road runs nearly East and West. I am positive that it was at right angles to the county road, and nearly parallel with the tracks. The rear end of it was just probably a matter of two or three feet from the freight station, but I am not positive of the distance. I stated Saturday that I heard the whistles of the train before the auto reached the crossing. I could not state how long before, probably a matter of 25 or 30 seconds. I was conscious of another whistle blowing before it reached Allentown. The first stopping place north of Allentown is Quarry, and it must be about 700 yards between the two stations, and the bridge across the river is North of that. It is pretty close to 900 or 1,000 yards between the bridge and the station called Quarry, and I heard the whistle before it reached Allentown and also after it passed Allentown. It was approximately half way between that station and Riverton. I did not see the train when the whistles blew, but I am led to believe that it was half way between Allentown and the crossing from the location through the sound waves. I don't

know the time between the whistle that blew at the other side of Allentown and the one midway between it and the crossing. It was approximately a minute or 3/4 of a minute, something like that. The second whistle was two long, a short and then a long one, the regular crossing whistle. I don't remember hearing any whistles after that—these being all that I remember. I could not give the time between the whistles and the time that the auto was struck, but it was a very short time. I heard the bell ringing when I was talking to Mrs. Springer during the latter part of our conversation. It was the ordinary ringing, and the first whistle that I heard was while I was talking to Mrs. Springer, and the second would be just about the time that we parted. On such a day as July 25, 1912, I could hear the alarm gong at the crossing I should judge North and South and probably East for 800 or 1,000 yards and probably more, that is 3,000 feet or over a half mile, and I could hear it on such a day that distance away. I have probably placed that distance a little too much for hearing the gong on such a day on account of the noise, but I feel positive I could hear it under those conditions fully from 1,200 to 1,500 feet, and if it rang while I was talking to Mrs. Springer she ought to have heard it, and if Trena Brock was then along with her she ought to have heard it. They both should have heard the whistles. You cannot hear the bell as far West of the cars as you can East on account of the bluff partly obstructing the sound, and the same condition exists with regard to the

alarm bell; that is you could not hear the alarm bell as far West as you could when you were going East because the bluff diverts the sound and the same bluff effects the Southbound train in the same proportion, so that you could not hear the Southbound trains as readily as you could if there were no bluff there. There are points on the highway West from my platform where you can see the tracks at Allentown, and yet not be able to see the tracks on the curve between my store and Allentown and at such a point you can see the tracks at Allentown and yet there might be a train or an electric car on the West track between Allentown and Riverton that you could not see on account of the curve. I should say that such a point was approximately 90 feet or more West of the track. While I think at a point 90 feet West of the track you can see the tracks at Allentown, I do not know whether you could see them or not at a point 100 feet West of the track. My attention was not definitely called to that while I was there on the ground. I think at a point 70 feet West of the track you can see a car all the way on the West track from Allentown but not the whole of the train all the way. You could just see the East side of the car part of the way for a short distance but not the entire car. Still I am not certain. I have looked to see and I am pretty positive that at a point 60 feet West of the track you could see the train the whole distance, that means measuring in the middle of the road to the Westbound rail. I should judge the train was running 30 to 35 miles an hour

when it struck the auto. It is possible it was nearer 35 than 30 miles. I did not see the train until it struck the auto, and the moment it struck it it passed behind the freight house and I could not see it after it passed the freight house. I only saw it for a part of a second of time and yet I think I am able to have some idea of the speed it was going at. When I was looking at the auto, I did not notice any other vehicles around there. I saw Mr. East on the witness stand, but I do not remember a delivery wagon crossing at the time of the accident nor did I notice any after the accident, but there might have been a hundred there and I would not have known it because I was too busy attentding to those who were in need at that time. I was helping the two ladies who were thrown out of the car. I did not notice any automobile standing on the other side of the crossing. After the auto passed me, I watched its course toward the track. I did so because of being conscious of the aproach of the train and seeing also the auto approach the rails. In the summertime the traffic on the road there is very heavy, and was heavy on that thoroughfare in 1912. At certain parts of the day vehicles are passing nearly all the time. The next day after the accident, the coroner of the county held an inquest and I was there and testified as a witness." Q. Did you testify to this effect: 'Q. (By Mr. Steele) Mr. Rosenberg, did you see this collision between Dr. Rininger's car and the railroad train? A. I partly seen it and partly not the platform in front of the store obscured part

of the accident. Q. Tell the jury what you saw of it as you saw it: A. I was standing below the macadam road probably about 6 or 7 feet below the level of the road when I heard the Interurban car blowing the whistle and the gong started a commotion, and was talking to a Mrs. Springer, and as Mrs. Springer started to go west on the road I observed an auto coming down the grade and to me it appeared as it didn't go an unsafe rate, I should say between 15 and 20 miles an hour. It appeared to me that the man was aware of the car coming and slowing down, so I paid no more attention to it, but as the car was approaching I reached up and looked over the platform to see if the car had come to a standstill, and not observing the car I glanced under the platform just as the collision occurred.' Did you testify to that? A. Yes sir. I testified to that in substance, only one or two words in there that might possibly be taken down wrong, or I may not have expressed it right on account of not speaking very plain at the time; that is the words 'as the car appeared' (Continuing) To me, as far as my memory goes and what I am trying to impress, the words should read 'the car not going at too safe a speed,'the other part I remember distinctly. (Continuing) I glanced over a copy of my testimony taken at the coroner's in quest about two weeks ago. I read it over in Mr. Tait's office and asked him if he would give me permission to read it over." Q. Now did you testify to this: 'Q. How far was the auto from the crossing when you first saw it? A.

About 60 or 65 feet,' did you testify to that? A. I don't remember how I could come to give that statement. Q. You don't remember whether you testified to that or not? A. No. (Continuing) "If that statement appeared in the transcript of the testimony which I gave at the in quest, it is possible that the language is correct, though I cannot see how I could make it or use that language because I was standing further away from the crossing than that, and I observed the auto before it came abreast of me." Q. I want to find out whether or not this is a correct statement of what you said before the coroner's inquest? A. It must be that as far as I know. Q. And that was the next day after the accident? A. Yes sir. Q. Did you not also testify as follows: 'Q. You say it attempted to slow up. A. Apparently; the car was running smooth and noiseless except the engine was shut down,' did you testify to that? A. Yes sir. Q. And that was true, wasn't it? A. Yes sir. (Continuing) "I noticed that the red lights on top of the gong were burning at the time. I noticed this as I was standing beside the platform below the grade of the road and the platform was between me and the gong; I was below the platform." Q. Then you had to look under the platform, didn't you, to see the lights? A. Well, as a matter of fact, I can't say that I looked at the red lights at the time—I can't say that I did. (Continuing) "I only know that the gong can't ring without the lights burning. I do not now recall seeing the lights burning at the time. Q. Did you fur-

ther testify at the coroner's inquest as follows: Q. Approaching Seattle on the public highway in an automobile 60 feet East of that crossing, a man sitting in the seat, how far could he see the railway train going to Tacoma? A. I think there is one point in the 60 feet where he would be able to see the train at two points, would be able to see it about 200 yards away. Then there is an intervening space you could not see it at all at 60 feet from the crossing until the car probably comes within 100 feet of the crossing,' did you testify to that? A. I testified to the approximate distance. Q. Well, you gave this testimony? A. Yes sir. Q. Was that correct? A. As far as the wording is concerned, though I said at the time 'approximately'; of course I had not taken any measurements. Q. There is nothing in this said about 'approximately,' is there? A. Not that I heard. Q. Then you did not use the word 'approximately' when you gave this testimony? A. Probably not just there. The approximate distance had been gone over at the coroner's inquest before, as I remember. Q. Did you testify as follows: 'Q. Did you see this automobile stop before the collision? A. No sir, the platform obscured my view. Q. How far was the automobile from the track when you last saw it before the collision? A. About 40 feet'; did you testify to that? A. I think I did. Q. And was that correct? A. No, the distance was not given quite correct there. (Continuing) "I do not remember hearing any bell on the car." Q. Did you testify to the following: 'Q. How far did this rail-

way train run after the collision beyond the crossing? A. In the neighborhood of 100 yards. Q. And then it stopped? A. Yes sir'; did you testify to that? A. I think I did, yes sir. Q. Is that correct? A. As far as the testimony there is correct. Q. It went about 100 vards before it stopped? A. I gave that testimony there. Q. Now was that the correct distance it ran before it stopped? A. I had no means of knowing that the distance is correct; that was just approximate—what I approximated it to be. (Continuing) "That would be about 300 feet. I testified at the inquest that I first saw the train just after it had struck the auto, and that is correct as near as I can judge, so that I did not see the train until after it struck the auto that I can remember. I might possibly have had a glimpse of it." Q. Did you testify at the same hearing as follows: 'Q. You heard it blow one whistle first; that was the first whistle which blew, one blast. A. That question I said I was not positive on. I had an impression I heard that. Q. You are not certain that you heard that one blast. A. I could not swear to that, but I had the impression— Q. Then you stated you heard four blasts of the whistle close together. A Yes sir'; did you testify to that? A. Yes sir. Q. Was that correct? A. As Near as my mind can grasp it. (Continuing) "So that I testified at the coroner's inquest that I could not say definitely that I heard the first blast, but that I had an impression that I heard it, so that the next day after the accident I could not remember distinctly whether I heard the

first whistle or not. I do not remember any more definitely now than I did then that I heard the whistle at Allentown. I have the same mental impression." Q. Did you also testify at the inquest as follows: (Speaking about the auto) 'Q. Now, on what were you basing that distance if you did not see the train. A. Just the sound only. Q. The sound only. A. Yes sir. Q. Were you paying any particular attention to it for any reason to be observing it to size up the distance before the collision? A. Yes sir, I have a reason in one respect. I see the autos and narrow escapes almost daily; I have almost a dread when I hear the ringing and I see a machine pass on the road, because I see daily close escapes of machines attempting to cross the track before trains'; did you testify to that? A. That is my testimony. Q. And that is true, is it? A. Yes sir. Q. Is that due, in your judgment, to the fact that the vision of the train from the highway is obstructed or because it is a dangerous crossing on account of the topography of the country? (Objected to as irrelevant, immaterial and incompetent. Objection sustained. Exception noted). Q. Did you further testify as follows at the inquest: 'Q. You simply gave your best judgment that the train was 450 feet away when it blew those four blasts of the whistle? A. Yes sir. Q. And gave no other signal from that time until the collision that you know of? A. Not to my knowledge.' You testified to that? A. I must have done that. Q. And that is correct, isn't it? A. As to the distance? Q. No, I mean your tes-

timony which you gave is correct. A. Yes. Q. Now, did you not also testify to this: 'Q. Is it not a fact that at a distance of about 50 feet an approaching train—an approaching train from Seattle towards Tacoma disappears at a distance of 150 or 200 feet from the crossing and emerges again at the telegraph pole, which is about 100 feet? A. Yes sir, I think that would be pretty near right, at 50 feet a person would probably not see the full distance down to Allentown'. Did you testify to that? A. To the language of it, I did, but as to the distance I did not know. Q. Was that statement then true? A. It was true. The distance had not been measured, but I was only asked to give a mental approximate distance which I did offhand. (Continuing) "It is not my testimony today. I have made measurements since that at my own request to satisfy my own mind. I was not requested to make such measurements by any one. I did not help the photographer make the measurements respecting the train disappearing. I am in the grocery business at Riverton and am in the employ of the defendant at the present time, and have been in its employ since after the accident, not all the time; I don't remember the intervening space of time since then, but have been in its employ over a year. My sons are not in the employ of the company. I have charge of the Riverton Crossing for the defendant, serving as a flagman or watchman. I also have charge of the keys to the freight house there. I am not the freight agent there because they have no freight

agent. The only connection I have with the freight is that I have charge of the keys to the freight house. and I receive a salary for watching and being in charge of the crossing, and I had charge of the door key to the freight house at the time of the accident and have had since I went into the store. My predecessor had the key and when I took charge of the store I also took charge of the key. I had been in charge for about 5 months and was receiving free transportation over the road for that service and this free transportation continues now. When I first saw the auto, I must have been approximately 80 feet from the crossing but I did not remain the same distance; I walked down toward the platform probably 10 feet so that I was approximately 70 feet West of the crossing at the time of the accident. I don't remember seeing any delivery wagon or vehicle around at all at the crossing after the accident."

#### Redirect Examination.

"When I testified before the coroner's inquest the day after the accident, I had not made any observation for the purpose of determining the various distances which you could see an approaching train at various points back from the track, and the distances that I gave at the inquest were approximately only. Just my general recollections of the surroundings. In the transcript of my testimony at the inquest to which my attention was called this morning where it is stated, "and as Mrs. Springer started to go West on the road I observed an auto coming down the grade, and to me it appeared as it did not go an unsafe rate-I should judge between 15 and 20 miles an hour." I don't think that was the exact language that I used. I think what I said was "at not too safe a rate." I think that what I said was "to me it appeared that it did not go at too safe a rate." On the day of the accident, the weather was clear and the road was dry and dusty. I do not remember that there were any spots on the road within 100 feet of the track which showed this soft asphalt oozing through the surface. There was no surface indication of any oozing where the skidding took place, so far as I can remember. The repairs on this road, as I remember, began about 5 or 6 weeks prior to this time and the workmen finished each section as they went along. They probably took a section of 25 or 30 feet and sprinkled it and then they finished that section and would go ahead with another section—following it up from time to time as the necessity arises, and spread this rock dust on the surface of the road until all the asphaltum is taken up. They finished the section lying within 100 feet of the track 5 or 6 weeks before the accident. They kept a man on it afterwards and it was about a month, a little more or less, prior to the accident before it was entirely completed. The rock dust that is used is a by-product of bisaltic rock taken from the quarry in that neighborhood, and when the rock dust is spread over the soft asphaltum it would harden it. The rock dust contains none of the properties of cement, but is an absorbant. It answers the purpose of taking up the oil that is in the asphaltum, leaving the base material hard. After the rock dust or screenings are spread over the soft asphaltum, it would be a solid mass. It would unite into one body and the degree of hardness depends upon the temperature. On a real warm day, the action of the sun beating on it for a very long time would make it so soft that perhaps you could make an impression with your heel, but on a cool cloudy day, especially in the winter time, it is sufficiently hard to become slippery, almost like brick. It would take 5 or 6 days for it to harden after the rock screening was applied."

## Re-Cross Examination.

"On that particular section, the coating of asphaltum was thicker than any other section of the road on account of the increase of travel and congestion on that corner. Probably it would be two or three inches thick, and it would take 6, 7 or 8 days to harden after they applied the crushed rock or screening to it, and if it were very warm weather it would take longer, and after it remained a while and the weather got warm again the surface would again soften so that you could make dents in it with the heel of your shoe, and then they would apply another coating of screening in spots. In the weaker part of the road, the oil is forced up in spots where there is the least resistance, and then the screening is applied to those particular spots again. The usual time for resurfacing is in the spring and summer. I think they began resurfacing this road down at Allentown—the portion between Duwamish and Allentown Bridge-if I am not mistaken up around near the Duwamish curve, as I saw the workmen going and coming. I think it was earlier than the end of June when they began surfacing there. I have a faint recollection that they started to fix that road after I had been in the store six weeks or two months. I spoke to the road supervisor in regard to rut holes close to the track. I know that personally, because I asked him if he were not going to fix it and he said "We will be up there pretty soon," and this was a couple of months after we had been in the store. The surface of the road that afternoon had become softened to some extent as it did on all warm days, but I did not observe any spots where it had oozed out in nearly a liquid form. Whenever that sweating process takes place and the public travels over it, it has a tendency, in a sense, to drag the asphalt and the rock into the storemy store is located there—and that is the reason why I watched it very closely and whenever I saw the supervisor of the road—if some of his men didn't attend to it regularly—I spoke to him and I do not remember any such instance at that time. I would not do this, however, unless it had oozed up in sufficient quantities so that it would adhere to the pedestrians' shoes." (A picture was then shown to the witness.) "This picture correctly shows the auto as it appeared after the accident. It shows the machine as though it were a little farther South toward the platform, and probably a foot or two farther West, but I am not positive of it. I think the auto should be two or three feet nearer the track as in the picture it appears as if it were over the West half of the freight platform. It is fixed in my mind that it should be nearer the track in the center of the freight platform. The picture referred to was taken within a couple of hours after the accident and before the machine was moved away." (The same was received in evidence and marked "Plaintiff's Exhibit 14") (Continuing) "I should say the auto was left 8 feet from the track, although in Exhibit 14 it would appear to be 11 feet or over from the track."

#### Re-Direct Examination.

"The road is more slippery in the colder weather, provided the road is clean and free from all grit on the surface—the rain washing it off makes the road more slippery in the winter time with the hard surface. There has been absolutely no change either in the location of the fence, of the roadbed, of the store, or any object that I know of showing the topography of the road, and the bluff is absolutely the same."

## C. V. ALLEN, WITNESS FOR DEFENDANTS, TESTIFIED AS FOLLOWS:

"I live in Tacoma and am the land and tax agent of the P. S. E. Ry. Co. I am familiar with the rights of way owned by it, and also with the Riverton Crossing where the tracks of the company cross the public highway. North and South of the Riverton Crossing, the company owns its right of way 100 feet wide which is 50 feet wide on either side of the center line of the double tracks, on both sides of the county road, excepting the land owned by the county. This runs from Duwamish River on the North and practically all the way South. The right of way North of the crossing is described by metes and bounds, and the county road is excepted from the 100 foot right of way, so that the right of way has varying widths North of the crossing, but it is about 50 feet wide on the West side from the center line of the double track, which I can show on the map better. This red line here represents the center line of our right of way, and we own 50 feet Westerly of that center line and the county road on this side (East side). The stakedoff county road is a little different from the used county road. What is known as the located county road cuts diagonally across the right of way and runs practically parallel with the center line, but the used county road is different, and the county road as it is actually traveled is shown on this drawing marked Exhibit A."

#### Cross-Examination.

"Our company makes no claim to the county road between the two cattle guards nor to the macadamized portion of the road North of the crossing. We make no claim to the county road, and this fence on the West line North of the crossing is not on the boundary line. Our line is about  $11\frac{1}{2}$ 

feet farther west. I do not know who built the fence. I think it was built at the time our road was constructed. I have been in the company's employ three years. There is a foot path on a portion of our land on the West side of the track."

## CHARLES H. SHARP, WITNESS FOR DE-FENDANTS, TESTIFIED AS FOLLOWS:

"I live at Riverton; have lived there about four years; am working for the Seattle Star. Have never been in the employ of the P. S. E. Ry. Co. I was on the East side of the track at Riverton looking toward the North when Dr. Rininger lost his life. I will make a mark on Exhibit A showing the point where I was standing at the time of the accident. This point is lettered S, which was a little South of the center of the county road on the East side of the track. I saw the train from Seattle that collided with the auto. I had been standing there about a half minute. I happened to be there because I saw the car coming and I ran across and just then I saw the auto skidding and I was on the North side of the station and the car came right on the auto. I did not hear the train blow any whistles. I am kind of used to hearing it blow the whistles and did not notice it. I think the electric gong was ringing but I am not quite sure. I saw the automobile before it was struck. The rear wheels were locked and not turning. The auto was going at a good rate of speed. I would not call it slow. Am able to state at the rate of speed it was going. I think it

was going between 25 and 30 miles an hour when I saw it. It was about 30 feet from the track when I saw it and the wheels were then skidding. It was then that I saw it. They skidded about 40 feet until they came to a stop. When I saw the automobile the train was about 15 feet from the North side of the cattle guards on the North side of the track. When I first saw the automobile it was about 40 feet from the track. The train was right at the point marked letter C on Exhibit A."

#### Cross-Examination.

"At that time I was not working. I was down to the store that day to get some groceries. I had my bicycle down there. I was not on it. At that time I was 14 years of age. I am now 16 years. I came from Rosenberg's store. I rode from the store down across the crossing, and then I got off. I saw the automobile after I got off, and after I got across the crossing. When I first saw the automobile it was about 30 feet from the track and little West of Mr. Rosenberg's store about west of the platform, which goes into his store, and I saw the train at that moment. I noticed the bell ringing there. I think I saw the automobile first, and about two seconds afterwards I saw the train. It was then about ten feet on the North side of the passenger station, I mean by that the platform North of the crossing. There is no building there, just kind of a platform; and the train was about ten feet North of that platform, which is about 25 feet long, so that the train

was 30 or 35 feet North of the crossing, and I saw it about two seconds after I saw the auto. The auto was not coming directly toward it. It was coming kind of North of me, because the road didn't come right toward me. I will mark the point with the letter F on Exhibit A as the place where the auto was when I first saw it. This is East of Mr. Rosenberg's store. I said a moment ago that it was West of it. I think now that it was East of it, that is I think now it was East of Rosenberg's store, but West of the freight depot. I was mistaken then when I said it was west of Rosenberg's store. It came along in the middle of the road. When it stopped the front wheel was in the center of the gravel road. I don't think it was over on the South side of the macadam when it stopped. I am not positive but I don't think so. It had stopped before the train struck it, but did not squarely face the track. It was not approaching me quite directly. I do not think with the automobile approaching me in that way that I could very well tell its rate of speed. I have not been accustomed to driving automobiles. We have none in our family, and I have never driven one. I have only ridden in one once or twice. Never rode in one as large as this. I am led to think it was going 25 or 30 miles from the way it skidded and the speed it was going when it hit the track. When I saw it, it was about 30 feet from the track, and it had stopped just as the front wheels got to the track. I said it skidded 40 feet. When I saw it it had already started to skid. It was skidding

when I saw it. I did not notice any whistles from the car. I am so used to them I didn't notice it. I stayed there about 25 minutes after the accident. I didn't notice any other trains coming in at all. The local did not come in from the North within a few minutes after the accident, and I did not notice the limited coming from Tacoma on the South track after the accident, although I was there 25 minutes after the accident. I didn't notice any other trains coming in at all. The local did not come in from the North within a few minutes after the accident, and I did not notice the limited coming from Tacoma on the South track after the accident, although I was there 25 minutes. I did not hear the bell ring after the accident. I went into the store about 15 minutes after the accident. I am quite sure that I heard the bell ringing before the accident, but cannot say for sure. I have talked with my mother about the accident, but with hardly any other people. I went to Mr. Rosenberg's store. I did not hear any discussion in the store about the bell ringing. I did not see the delivery wagon coming up toward the crossing. I saw no delivery wagon there after the accident nor an elderly man drive up right behind the auto just a moment after the accident. I think there were two ladies in the automobile that were thrown out, and I saw two men pick a woman off the track. I did not see any one help the other woman. I did not see a delivery wagon halted for 15 or 20 minutes near the crossing nor an automobile approaching from the North. I

went over on the West side of the track after the accident. I did not see any automobile coming from town. Before the accident I came right from the store on by bicycle and got off and saw the auto coming on the track and the car coming, and that's all I saw. I stood there a half a minute before the accident and heard the car down at Allentown. I am a friend of Mr. Rosenberg's boys, quite intimate with them. The ages of his boys are nearly mine, and I am quite friendly with one of them. I have not talked this matter over very much with them. After I crossed the track and before I stopped and looked back I did not see the automobile. I heard the car down at Allentown 3 or 4 seconds before I got off the bicycle, just heard it when I ran over the crossing. There is a good deal of traffic on the crossing."

#### Re-Direct Examination.

"When I saw the auto it was quite a bit nearer to me than Mr. Rosenberg's store, about 10 feet nearer."

# MRS. CLARA ROSENBERG, WITNESS FOR DEFENDANTS, TESTFIED AS FOLLOWS:

"I am the wife of Mr. Rosenberg who has just testified, and have lived at Riverton about two years; was living there at the time of the accident, and was in the store before the collision. I saw the automobile as it passed in front of the store. I am not able to estimate the rate of speed at which automobiles move, but as it passed the store, it seemed

to me it was going fast. I could not estimate the number of miles, as I am not familiar with them. When I observed it, it was about 97 or 98 feet from the track. I am able to state this distance because some parties there measured it one day with a tape line, and they asked me to see if it was correct. I pointed out where the automobile was when I saw it, and the measurement was from that point to the track, and it was about 97 or 98 feet. I was in the store back of the counter right by the window and saw through the glass window on the door. There is a window in the door, and one on the side, and I was standing sidewise and glanced out of the window of the door. As the automobile passed my range of vision through the door it did not seem to slackened speed any. I just saw it for an instant, and it then passed out of my sight."

#### Cross-Examination.

"The measurement referred to by me was made about two weeks ago, almost two years after the accident. I had seen no measurements made before this time. When the auto passed, I just glanced at it—just looked out and back again. I was not waiting on a customer at the time. I think I was not doing anything but talking with some one. I was more interested in my conversation than in the automobile. Subsequent events have impressed the automobile more on my mind than it did at that instant. Mr. Rosenberg was below the platform some place; I don't know exactly. I did not see him

until afterwards. I did not see Mrs. Springer that afternoon. The measurement of 98 feet was made to the center of the crossing. I was with the men at the North end when they measured it, and at the track also, and it was in the center of the road that they measured it. I could not tell whether the auto was in the middle of the road when it passed or not, as I did not notice that. The glass in our door is just an ordinary one. The door itself is probably  $2\frac{1}{2}$  feet wide and the glass is inside of that, and I saw through this glass. I did not go to to the door and look out."

## MARTIN BAKER, WITNESS FOR DEFEND-ANTS, TESTIFIED AS FOLLOWS:

"I live in Seattle; am a photographer; make a specialty of commercial work. (Photographs marked for identification Defendants' Exhibits I, J, K, L, M and N were shown to witness who examined them) I made the negatives from which these prints were made, and took them on February 7, 1914. They are correct pictures and representations of the objects and scenes which they purport to depict. (Said exhibits received in evidence without objection.) When exhibit J was taken, the camera was 54 feet on the East side of the track which would be the North side looking down the road in a Westerly direction. The camera was on the right hand side of the tracks looking towards Seattle, in a Westerly direction. In exhibit N the camera was pointed South on the track 133 feet

North of the center of the county road. In this instance the camera was located on the front end of a car where the motorman is, taken right through the glass window at a point where the motorman would stand in running a car. In exhibit I, the camera was located on the top of the platform on the right hand side of the track looking toward Seattle on the East side. It was 59 feet from the center of the road on the crossing. The camera was pointed Northwest. In exhibit M, the camera was standing 28 feet from the center of the road North of the road looking South. In exhibit L, the camera was standing on the car in the same position as the other one I testified about looking through the window, and is taken from the middle of the bridge 1016 feet North of the center of the road looking South. This was taken opposite the Westerly end of the middle of the bridge that crosses the river. When these photographs were taken from the front end of the car, the car was on the West track. In exhibit K, the camera was located on the car in the same position as the one previous to this looking South, and it was 797 feet to the road, and was taken on the car standing on the Southbound track. All these pictures about which I have testified are views of the Riverton Crossing, but not directed at any fixed point. All these measurements given by me relate to a point on the West rail of the West track in the center of the county road at the Riverton Crossing."

#### Cross-Examination.

"In Exhibit N, there is a man standing with his hat in his hand. He was 90 feet from the track in the middle of the road. In exhibit M, there is a man standing in the foreground. I do not know how far he was from the track."

#### Re-Direct Examination.

"The man with his hat in his hand shown in exhibit N is the figure appearing on the right of the photograph 90 feet from the center of the Southbound West track in the center of the county road. I did not make the measurements. I saw the tape that was used in measuring it."

## WILFRED DE JARLIUS, WITNESS FOR DE-FENDANTS, TESTIFIED AS FOLLOWS:

"I live at the Barker Hotel in Seattle, and am in the automobile business; have been in that business now two years. I am not a salesman or a demonstrator, but I own the cars. I have three rented cars, and understand the practical operations of automobiles. I drive them myself and am familiar with the point where the county road crosses the tracks of the P. S. E. Ry. at Riverton. I have crossed it every summer during the summer months on an average of once a week. I was familiar with this crossing in the latter part of July, 1912. At that time the roads were in fairly good condition, with the exception of bumps, rough in some places due to the road being worn. That road is slippery

when it is raining; that is the only time that I found it slippery, which is true of all asphalt roads." Q. Suppose that a Sterns automobile weighing 4500 pounds, a four passenger car, should be approaching the Riverton Crossing from the West coming towards Seattle and should skid from a point 39 feet West of the West rail of the nearest track, coming to a stop with the front wheels practically at the rail but not quite over it, on a bright, dry day with a dusty road, what rate of speed would you say that automobile was running at when it first began to skid? A. Did the car have plain treads or did it have steel studded treads? Q. I don't know—that does not appear in the testimony. A. Well, a car with steel studded treads is liable to skid more than a car with plain rubber treads. Q. By 'treads' you mean the rubber tires. A. I mean just natural rubber treads. There are some tires that have steel studded treads that look like a rivet that will skid on a dry pavement, but if it was a plain rubber tread on the car, a car that has skidded 39 feet was not going at less than 30 or 35 miles an hour at my driving. Q. On that particular road at the time I have mentioned, assuming it to be dry and dusty, within what distance would such an automobile as I have described, or within what distance should an automobile as I have described be stopped, if running at the rate of 12 miles an hour? A. About 12 feet.

Cross-Examination.

"A heavy automobile is not necessarily more

liable to skid than a light one, as a heavy machine will hold the ground. If the machine itself weighed 4500 or 5000 pounds and had four passengers in it, it would probably make three miles an hour difference. I mean by that a car with a heavy load in, you probably could not stop it less than three miles an hour shorter. It makes a little difference, not much. If a machine skidded 21 feet on a road that had been recently sprinkled with crushed rock or rock dust, more or less loose, and the machine weighed 4500 or 5000 pounds, with 4 grown people aboard, coasting on a four per cent. grade, it must have been going at least 25 miles an hour. A machine on a descending 4 per cent grade, weighing between 4500 and 5000 pounds, with four passengers in it, and the wheels suddenly locked, could not skid unless it was going over 20 miles an hour on that grade up there. I am now operating two Pierce Arrow 6-cylinder cars and a Packard; have operated a Sterns car about 6 years ago in the City of Goldfield, Nevada. It had 50 horse power. it rained the day before, and there was sunshine the next day, it would not effect the road."

#### Re-Direct Examination.

"I know of my own knowledge the sort of a machine that Dr. Rininger was running, which was involved in this accident, and if that machine at that time and place skidded 25 feet up to the track before it came to a stop, I would judge that its speed must have been from 25 to 28 miles an hour."

## ROBERT S. TAYLOR, WITNESS FOR DEFEND-ANTS, TESTIFIED:

"I now live, and have lived in Seattle since 1906, and am an automobile engineer, and understand the practical operation of automobiles, and am familiar with that type known as a 4-seated Sterns. Assuming that it was a 60 horse power machine, I should judge that its weight would not exceed 4500 pounds. I am familiar with the Riverton Crossing on the line of the P. S. E. Ry. South of the City, and have occasionally gone across itprobably 4 or 5 times a year. If a 60 horse power automobile weighing 4500 pounds, with 4 passengers, including the chauffeur, should approach the Riverton Crosisng from the West driving toward Seattle on a bright, warm afternoon the latter part of July, and the brake was applied with such force as to lock the two rear wheels, so that the machine skidded after the wheels were locked a distance of 39 feet, and then came to a stop with the front wheels almost but not quite upon the West rail of the West track, I should judge that it was traveling not less than 30 miles an hour; and if, under the same conditions, it skidded 25 feet, then I should judge its rate of speed was a little better than 20 miles an hour; and if such a machine above described approached the Riverton Crossing from the West coming toward Seattle on a dry afternoon with a dusty road and was traveling at the rate of 12 miles an hour, and that when the machine came to

a stop the front wheels were almost but not quite upon the first rail of the West track, it could be stopped within 12 feet."

#### Cross-Examination.

"I mean by an automobile engineer, a man who has charge of the designing and construction of automobiles. I am at present engaged in operating an automobile repair shop. I have personally owned a car for the last 4 years. I was superintendent of the Winton Motor Carriage Company for 4 years during which time I had entire control of all the cars both in the building and outside, which necessitated a great deal of driving and the operation of heavy automobiles. Previous to that time I was a tester for the Olds Motor Works and also tester for the Ford company. I am now driving a Cadillac, which weighs from 3200 to 3300 pounds. 4500 pounds would be the approximate shipping weight of a 60 horse power Sterns. It might come to a little less, but its weight is within 150 pounds of that amount. We usually allowed about 150 pounds for gasoline, water and all of the accessories on a car, which would include the extra tires. weigh 30 or 40 pounds. Such machines carry 25 gallons of gasoline, which weighs 8 pounds to the gallon. This would make the gasoline weigh abut 160 to 170 pounds. I was calculating on 22 gallons being in the tank. The water in the radiator weighs 40 to 50 pounds. The gas and water alone would weigh nearly 200 pounds if it was just filled up,

and with an extra tire it would be 30 or 35 pounds more. The tools and appliances are included in the shipping weight. While frequently an extra tire is included in the shipping weight, I do not know whether it is in a Sterns. Having four grown people in the car, who would average 160 pounds apiece more, I should judge it would weigh over 5500 pounds. If the tanks and radiator of this car were full and there were 4 grown people in it, and it was going down on a descending grade of 4 per cent, on a macadamized road and the wheels were locked suddenly and it should skid 21 feet, I should say the car was going approximately 20 miles an hour. If the same car, under similar circumstances, going down this descending grade at Riverton, on a warm afternoon, and the brakes were suddenly locked, and it was going at the rate of 15 miles an hour, it would skid. You can always make a car skid if you are going anything over 10 miles an hour, and you can make it skid at less than that if you have a powerful enough brake, as the quick application of the brake has something to do with the skidding, so that if they were applied gradually and slowly, the car would not skid, but if the brakes are applied suddenly and the wheels are locked, the car is apt to skid, and if a car were running 12 miles an hour, with its load weighing 5500 pounds, running on a descending grade similar to the crossing at Riverton and the wheels should be suddenly locked, I would estimate that it would probably skid 12 feet, and if it were running 15 miles an hour

under similar circumstances and the wheels were suddenly locked it would probably skid 16 feet. I have tested the matter out several times, and know I could stop a loaded car running at 12 miles an hour in 12 feet on a down grade up to 5 or 6 per cent."

#### Re-Direct Examination.

"The better way to stop an automobile is to apply the brakes so as to give the greatest friction possible without locking the wheels, and if you apply the brakes so that the wheels will just not skid, that is the greatest power you could give it in the way of stopping, so that they just will not skid, and this will stop the machine quicker than if you apply the brakes so strong as to cause the wheels to skid. When I say that you could stop a car running at 12 miles an hour within 12 feet, I mean if you apply the brakes so as to lock the wheels you could stop it within a shorter space than if you do not lock the wheels."

## D. M. DINGWALL, WITNESS FOR DEFEND-ANTS, TESTIFIED AS FOLLOWS:

"I am a motorman on the P. S. E. Railway, having been such for a little over 11 years, and have been running between here and Tacoma all the time, operating passenger coaches, and from my experience, as a motorman on this line, operating an electric train and cars, taking a single coach chair car type, running at 35 miles an hour, approaching the Riverton Crossing, in my estimation the least dis-

tance within which the car could be stopped making an emergency application of the brakes, assuming that the rail and all other conditions were most favorable, would be between 350 and 400 feet, and if such a car were running between 30 and 35 miles an hour, it would not be possible to stop it within from 80 to 100 feet."

#### Cross-Examination.

"This distance of 350 or 400 feet would be from the time the brakes were applied, and would give different results in the way of stopping the train by applying the brakes differently, and in order to get the best results for stopping we apply the emergency brakes; that is by putting the brake down in the emergency position, and we then get 15 per cent more braking power than by stopping it by the service application. If the car were running at 30 miles an hour, it could be brought to a halt within 300 and 350 feet, and if a motorman were approaching a place similar to the Riverton Crossing and when within 133 feet of the crossing he observed an automobile approaching the track and he was running at 30 miles an hour, he could reduce his speed about 20 miles an hour. If he were running 35 miles an hour and saw the auto 133 feet away and immediately applied his brakes, he would likely be running at about 25 miles an hour when he reached the auto. If a man saw an object 100 feet away and applied his brakes so that when he reached the object the car was running at 30 miles

an hour, it must have been running about 35 miles an hour when he applied his brakes."

## EUGENE C. SANFORD, WITNESS FOR DE-FENDANTS, TESTIFIED AS FOLLOWS:

"I live in Seattle; am a motorman for the P. S. E. Ry., and have been such for 8 years, operating both freight and passenger trains, and am familiar with the tracks of the company North of the Riverton Crossing. If a Southbound train were approaching that crossing at the rate of 35 miles an hour and the brakes were working properly, and all conditions for making a quick stop were the best, the car could be stopped by an emergency application within 350 to 400 feet; and, if, under such conditions, the car were running 30 miles an hour, it could be stopped within 300 to 350 feet; and if the car were running 30 miles an hour, it would not be possible to bring it to a stop before reaching the crossing when the brakes were applied at a point 130 or 135 feet North of the crossing."

#### Cross-Examination.

"I have been in the employ of the company for 8 years. I have had occasion to apply the emergency brake several times. If a motorman had applied his emergency brakes at 133 feet from the crossing, and the car was running at the time at the rate of 35 miles an hour, the rate of speed of the car would be reduced about 10 miles an hour, and if he were running at the rate of 30 miles an hour and had so

applied his brakes, he would have reached a speed about the same."

#### Re-Direct Examination.

"I have passed over this crossing on an average of twice a day, sometimes four times, for eight years. I am at present a freight motorman, which I have followed now for six years. I have not been running passenger coaches during that time as much as freight, but probably have done so a third of the time. I never applied the emergency brake at this crossing. The application of the brake to a car while it is rounding a curve does not make any difference in the speed."

## F. J. DUNN, WITNESS FOR DEFENDANTS, TESTIFIED AS FOLLOWS:

"I live at Tacoma; am a motorman for the P. S. E. Ry., and have been for 11 years, running passenger trains. I am familiar with the Riverton Crossing passing over it in the last year twice a day. Before that, for 6 years, it was six times a day. If a single coach chair car type of train should approach the Riverton Crossing going South, and when nearing the crossing was running at the rate of 35 miles an hour, and all conditions were most advantageous for making a good stop, it could be brought to a standstill within between 350 to 400 feet, and if it were running at 30 miles an hour, it could be brought to a stop in about 300 feet. It would not be possible for a motorman to bring his train to a

stop if he were 133 feet North of the crossing before he reached the crossing. I was motorman on the local that left Seattle at 4:05 following behind the train that collided with the automobile, reaching Riverton 12 or 15 minutes afterwards. When we got to Riverton, the limited was about 200 feet the other side of the crossing. We stopped our train before we got to the crossing, just far enough up to let the passengers get off on the platform on the North side of the road. The electric gong was ringing when we got in there, and rang until the limited train went North which picked up the injured. We stayed at Riverton until the Northbound limited passed. The bell was not ringing when we left. The limited had cut it out just North of the crossing on the Northbound track. The limited stopped there until they took on the injured which was on the North side of the road. The passenger platform for the Northbound train is on the South side. The Northbound train stopped on the North side of the road because it was the handiest place for them to load on the injured."

#### Cross-Examination.

"When I say 'the injured,' I mean the people injured in the automobile accident. There was only one that I saw that they carried on the car. The limited did not stay there very long. I think we reached Riverton on our trip in about 12 minutes after the limited reached it. When we reached Riverton, the bell was ringing, and was cut out by

the other car. We had been there about a half hour before the Northbound train came along. When I was there, the limited stood 200 feet from the crossing, I mean from the South side of the road, but I made no measurements. I walked up to it with the wrench to assist the motorman to remove his fender. The brace to it, which was attached on the right side, was injured; that is, we had to remove the fender in order for him to take his pilot off. The brace which held the pilot had to be taken off before the train could proceed. I did not count the line poles. I estimated the distance at the time. I did this because it was in my line of business to notice in what distance the car was stopped. A car would not be going very fast if you could stop it within 133 feet after applying the brakes, probably 12 or 15 miles an hour. I would not think a car running 12 miles an hour could be brought to a standstill within 50 feet by the emergency brake. These cars are heavier than street cars. They weigh about 35 tons. I have never had occasion to apply the emergency brake at Riverton. Different conditions effect the space in which you can bring a car to a standstill that is running 35 miles an hour. and a curved track at that particular point would not have anything to do with the stopping of the car. I do not think that a car could be stopped any more quickly on that curve than on a straight track because it is not binding enough to make a great deal of difference. If a car were running 30 miles an hour coasting, it could not be stopped in any shorter distance."

## J. R. MORRISON, WITNESS FOR DEFEND-ANTS, TESTIFIED:

"I live in Seattle; am a civil engineer, and have been such for 30 years. During the year 1912 I was county engineer of King County, holding that position for four years from January, 1909, to January, 1913. I am familiar with the construction of the county road at the point where it crosses the tracks of the Tacoma Interurban at Riverton, especially the road West of the tracks, as that was originally built as a water-bound macadam road; that is, in the construction of a water-bound macadam road, the ground or base is prepared by rolling and then a layer of rock or crushed stone of practically 1½ to 3 inches in dimensions and to a depth of about 4 or 5 inches in thickness is laid, and then rolled with a steam roller and then another course of finer stone, running from about 1½ inch to ¾ inch is applied, and that rolled in to fill the holes or voids between the larger rock; that is followed by another layer of finer rock, called screenings, running from 3/4 of an inch down to dust; that is spread over an inch and a half stone and water is freely sprinkled on that and the roller passed backwards and forwards; by the rolling and the use of the water flushing the fine material down until the voids or holes in the larger rock are all filled and the top sealed over with what is practically a rough cement. When

first applied that leaves a smooth, hard finish. During the Spring and Summer of 1912, the surface of that road was thoroughly swept of all dust, clean; a few places where there had been wear and there were little ruts appeared, they were loosened up and new rock placed in those ruts. Then the whole was given a coat of tarvia—that is a tar preparation which is used for a dust layer or binder. That was applied hot at the rate of about 4-10 of a gallon to the square vard of surface. That was covered with a layer of screenings and opened immediately to travel. Tarvia is a liquid. As we receive it it is about the consistency of a very heavy molasses, and we heat it in order to apply it to the road. After it has been applied and surface screening put over it, we open the road to travel. For the first few days, especially in warm weather, it needs pretty careful attention to see that there is enough screenings on in order to take up any excess of the tar. After the first week an occasional dusting, according to conditions, is necessary. Usually during the whole season there was a man detailed once a day, or whenever necessary, to pass over that road and cover such places as showed signs of breathing. A few hours after the tarvia is applied, it stiffens, hardens and produces with the screenings a layer which you might compare to the sole of your shoe, right on top of the former road. The total thickness would be from three-eighths to a half inch, average thickness. The tarvia, where the road is properly prepared, makes a perfect bond with the original sur-

face of the road. The screenings are thoroughly held and embedded in the tarvia, and wherever that is the case those are firmly held, there is always an excess of screenings applied which is swept off by the action of the winds or the automobiles. When this is done, the wheels take hold of the surface very well. This surface is a little rougher than the sheet asphaltum pavement which you find throughout the city here. Tarvia is an adhesive and not an oily substance. There are some light oils but most of those are evaporated by the heat. Such a road as I described offers good friction. The road for 100 feet West of the tracks at Riverton was treated in this way in May, 1912. I do not remember when the work was completed; I know at the time it was started. They would get through with that work at the rate of anywhere from two to four hundred lineal feet a day, according to the conditions of the weather. From the place they started it would have taken a week at the outside to get over the piece from the bridge to 100 feet west of the track. This work was done under my direct supervision."

#### Cross-Examination.

"They commenced surfacing that Spring at the Riverton bridge, with the exception of a little patch at Riverton just around a curve. It was commenced at the South end of the Riverton bridge and carried through to Orilla. Then the crew came back touching up the work back to the starting point; then across the bridge and put in the work from the

North end of the bridge, or the East end of the bridge up to Duwamish station, being stopped by the bad weather and cold weather in the Fall and not quite finished to the Duwamish station. They could not do very much when it was raining, and could not work rainy days in May and June. I have examined my record recently and know that they began work in May. They would cover from 200 to 400 feet of surface a day; and this preparation of tarvia softens by the action of the sun and it is inclined to do that more for the first few weeks after it is laid than later. That is because it has not absorbed all that it can absorb of the rock dust. The rains effect it in this way. A very light rain, during the first few minutes of the rain, it does effect it to a considerable extent. A very heavy rain, or a continued rain does not effect the slipperiness of it to any great extent. A very heavy rain leaves it in very good condition. The man detailed to look after the work goes over it from time to time, and if he finds that it softens so that it is oozing out, then he applies more rock dust or screenings, and this is done during the entire season, and occasionally the second year. I gave particular instructions to see that the work within 300 feet of the Riverton Crossing was very carefully looked after as there were a great many foot passengers, and when the tar is oozing to the surface, it makes it disagreeable for travelers, getting on their shoes so that I insisted that it be looked after. The macadam there is 16 feet wide and the ordinary graded roadway is 24 feet wide.

There had been a coating of tarvia on the road in this locality in 1911 so that the coating in 1912 was a second surface of tarvia, and would be thicker because of that fact. I do not think it would be any softer and would not be more likely to ooze as that is controlled mainly by the condition of the road when the tarvia goes on it, as a little depression in the original surface, or a little more open and porous will retain more of the tarvia below in a sort of storage, you might say small wells, and the heat may bring that through to the surface. This coat of tarvia in 1912 was 4-10 of a gallon to the square yard, which was just as thin as it would go on without standing in pools or without running. In fact sometimes it was swept with brush brooms to leave just what the broom would leave."

## ARCHIE APT, WITNESS FOR DEFENDANTS, TESTIFIED AS FOLLOWS:

"I live at Kirkland; have lived there for four years; am dairying. I was riding on the train that collided with the auto at Riverton in July, 1912. I boarded this train at Seattle, and was seated in the second seat from the front, at the right hand side next to the window, which was open. As we approached Riverton, there were two long and two short blasts blown about where the county bridge crosses the river at Riverton. I should judge this bridge as 300 yards North of the crossing. As this train was passing over the crossing at Riverton, the electric danger bell was ringing. When we were

within 150 or 200 feet of the crossing, I was looking out of the window and saw the automobile which was struck. When I first saw the automobile the train was about 50 feet from the crossing. The automobile was about 50 feet from the crossing when I first saw it. It was moving toward the crossing. The train and the automobile were just about the same distance from the crossing when I saw it, as I had been looking down toward the crossing some time before I saw it, and there was nothing that obstructed my view of it until I came right around the bluff, and I saw the left rear wheel skidding, as that was the side toward me, so that it was skidding when it was 50 feet from the track. I have not had any experience in judging the different rates at which automobiles run. I have ridden about 8 times before on the electric train between Seattle and Tacoma and from this and riding on other trains I am able to have a reasonably correct estimate of the rate of speed at which the train was moving when I saw the automobile, and I should think it was moving from 30 to 35 miles per hour. The speed of the automobile when I first saw it seemed to be just about the same as the speed of the train. I saw Dr. Rininger standing up in his machine, as the top of it was down, and I should say the auto was within 20 or 25 feet of the track when the doctor rose to his feet. After I saw the auto, I do not think the wheels revolved at all.

"I do not know what happened when the train collided with the auto, as I pulled my head in so I did not actually see the collision. I think the train ran about 250 feet farther after striking the auto. Afterwards I got off the train and went back to the crossing. When I got there, the electric bell was not ringing, and I stayed there about 15 minutes until the local came down from behind us, and when it came in the bell began to ring and continued ringing until the limited came from Tacoma, and then it stopped after the train passed over the crossing. When I got back to the crossing, I saw fresh marks on the roadway which showed that the wheels had skidded, and I estimated that the length of the skid marks on the ground was about 40 feet. These skid marks stopped about 13 feet before they got to the rail. I was going that day to Kent to work for Mr. Price. I have never been in the employ of the P. S. E. Ry. I never talked with any one about this accident until Mr. Jackson came over to see me a short time ago. I did not know at the time that he was connected with the company and no one connected with the company had ever talked with me about the accident before Mr. Jackson did, and he saw me two weeks ago Saturday. At the time of the accident, the conductor took my name and address."

## Cross-Examination.

"I should judge that the end of the skid marks was about 13 feet from the crossing. I did not make any measurement of the skid marks. I went back as soon as the train stopped and I saw the auto. It was pulled back to the side about 15 or 20 feet from

the track. I did not pay any atention as to what direction it was pointed in. It was not in the same direction as the road, and about 20 feet from the track. I could not say how far from the freight shed, as I just glanced at it. I was there 15 minutes and until the local went South. The limited from Tacoma came in before it went South and I stayed there until after the limited came in. I could not say whether it was a half hour after the accident before the limited came in or not, although I should judge I was there about 15 minutes, staying there until the limited from Tacoma passed by. I did not see them assist any of the injured aboard the limited nor did I notice the front of the automobile as I did not look at it. During the 15 minutes that I was there I was standing around at the crossing under the bell, and while I was there I did not notice a delivery wagon there. I saw two or three helping those who were injured in the automobile, but I did not see any man doing it who had a delivery wagon there. I noticed one automobile on the East side of the track, which I think was a twopassenger runabout. I could not say who was in it. I don't think there were any other automobiles at the scene while I was there. While on the train I was seated in the second seat from the front on the right-hand side as you go South, with the window open, and I remember when the car passed along this bridge. It slowed down, not much, and I remember when it passed the station called Quarry after we passed the bridge. I heard a whistle at

Quarry, two long and two short blasts. I do not have in mind now the time when the car passed the Quarry Station nor when it passed Allentown, and 1 did not notice anything about Allentown when we passed it. I heard four whistles, two long and two short blasts. When I heard it, the car was about where the county bridge crosses the river. I know that because I happened to glance over that way when the whistle blew. I did so because I took a bunch of cows up there once, and I know we had a lot of trouble on the bridge with them. The bridge is over on the left-hand side of the car, and there is a high board fence there, and I could see over the top of the fence; that is, I could see the top of the bridge, and I happened to glance over there and saw all this when the whistle blew. About a second before the collision I heard four other short whistles. I could not say how close to the crossing we were when I heard them. I could not say how long after I saw the auto it was before I heard these whistles. I have not been to the scene of the accident recently. The last time I saw the Riverton Crossing was July 30, 1912. I have not seen it since. I did not pay any attention to other buildings at the crossing on the day of the accident. Upon examination of Exhibit M, which shows Mr. Rosenberg's store, I would say that when I saw the auto, it was between the tracks and Mr. Rosenberg's store. The road runs East at that point, and I could not say how far East of the platform it was. I could not say how far East of the platform the auto was when I saw it

nor could I give any estimate of such distance. When I first saw the auto I should think it was about 15 feet from the freight house. My occupation is dairying, which I have followed for four vears. I was farming before that. I have been dairying and farming all my life. The only experience I have had in measuring distance is by stepping them off for the purpose of setting fence posts. Am now 25 years of age. The auto was about 50 feet from the crossing when I saw it. I heard the bell ringing as we went by. I did not notice the lights burning. The bell was not ringing when I came back from the car. There was nobody in the seat with me, but the seat behind me was occupied by two men, I think, and the seat in front of me was occupied by a man. I did not notice a woman with a little girl near me, as I was in the smoking car, and did not notice a woman looking out of the window, as there was no woman who sat near me. I have had no experience at running automobiles. I never owned or drove one. I have ridden 12 or 20 times in a Winton, a Ford and an Overland. I am not able to tell the speed at which an automobile is running while I am on another moving object, and if I were on a moving object like a street car and saw an automobile coming towards me, I don't think I could tell the rate of speed that it was moving at. I have not discussed this accident with anybody before seeing Mr. Jackson, and it had practically passed out of my mind before talking with him, but as soon as he spoke to me about the accident it

came back to my mind. The only thing that I noticed particularly about this occurrence was the fact that the left wheel was skidding. I did not see it when it stopped skidding because it was done so quick. The car that I was on was moving about 30 or 35 miles an hour." Q. At 35 miles an hour you would be running at a speed of about 3066 feet a minute, would you not? A. I could not swear to that. Q. That would be 50 feet a second—now, how long a time was it between the time that you saw the automobile before you struck it? A. It seemed like about a second or two seconds. Q. If you were moving then at the rate of 35 miles an hour, you must have been 100 feet away before you saw the automobile, is that correct? A. No, sir. Q. You are sure it was 50 feet? A. Somewheres about 50 feet. (Continuing.) "That would take about a second, and during that time I observed a car approaching the track, and that the wheel was locked, and I also observed a man standing up in the automobile and the ringing of the bell."

#### Re-direct Examination.

"It takes no longer to observe a man sitting than it does when he is standing. I could not estimate the speed at which the auto was coming towards the track. I was in the smoking compartment of the car near the front end, and there is no compartment between that compartment and the motorman. I was in the second seat from the front and against the wall. The two front seats face each

other, and if one were sitting in the first seat, he would be facing toward the rear of the car with his back to the front. When Mr. Jackson came to see me two weeks ago my mother and father were present."

#### Re-cross Examination.

Q. You say you saw the Doctor stand up in the automobile? A. Yes, sir, when I seen him he was standing up. Q. Was he standing up when you first saw the automobile? A. I think he was. Q. You think he was standing when you first saw it? A. I think he stood up when he was about 10 feet of the crossing, or something like that. Q. So that when you first saw the automobile he was not standing? A. I could not swear to that. (Continuing.) "The first thing that I noticed was the wheels skidding, and then I looked to see how many were in the auto, and I think there were four, and I saw the Doctor standing as soon as I looked to see how many people were in the car. The auto then, I think was about 10 feet from the street car, and after I got off the car and came back to the crossing, the only thing I noticed definitely was the skid marks on the road. That was all that I paid much attention to."

### G. E. HERPICK, WITNESS FOR DEFENDANTS, TESTIFIED AS FOLLOWS:

"I live in Seattle. Am a moving picture operator. Have lived in Seattle nearly a year. I was in the employ of the P. S. E. Ry. as collector, col-

lecting tickets in the front of the car and acting as brakeman, too. I was on the train involved in this collision. I was employed by the P. S. E. Ry. Company at the time, but not acting as collector, but just riding to Tacoma. I was seated in the second cross seat from the front end of the front compartment, which is the smoker; that is really the third seat back from the front. There is a shorter seat up in front and then one cross seat, and then the next, and I was in the second cross seat about 6 or 7 feet from the window looking from the body of the car out on the platform, on the right hand side. As the train was approaching Riverton, I was sitting next to the window with the window open, looking out most of the time, and as the train was approaching Riverton there were two long and two short blasts of the whistle blown just after we left Allentown, which is the regular road crossing signal. I heard other whistles afterwards just a second before we hit the crossing. There were three or four short blasts of the whistle. I did not hear the electric bell ring, as we passed over the crossing, but I saw the auto before the collision. I should judge it was about 50 or 55 feet from the crossing. The front end of our train was about the same distance. The auto was moving. I had been a collector on the limited train of the Interurban about two years, and in that way became accustomed to, and able to estimate the rate of speed at which the train was moving, and have had quite a little experience in riding in automobiles. Have never driven one myself. I never paid much attention to the speed of an automobile. When I first saw the auto I think our train was moving about 30 or 35 miles an hour, and the auto was running a little slower than the train. I should judge it was running from 18 to 20 miles an hour. I don't know whether the rear wheels were skidding or not, and I did not see the auto up to the time of the actual collision. There was nothing to cut off my view of the auto while I was leaning out of the window looking in that direction, but when the auto was within 2 or 3 feet of the collision I did not see it, as I took my head in. After the accident the train passed the crossing and stopped so that the center of the car was about opposite the third telegraph pole, counting from the pole that stands in the North end of the freight platform, which would be the first one, and the body of the car would be opposite the second pole South of that. I got off the train and went back to where the accident occurred and stayed there until the train which had the accident pulled out going South. I was at the crossing when the South bound local pulled in and the bell was ringing as it came in and continued to ring until it was cut out by the Northbound limited, just a little North of the crossing. I am familiar in a general way with the operation of those electric gongs or danger signals. I think the cut-in contrivance is about 1000 feet North of the Riverton Station, and when the Southbound train passes that point it starts the bell ringing, and it rings until the third rail shoe pushes over a small

rail and someway through electricity it cuts out that bell. This cut-out is located South of the county road about 20 or 25 feet. I got off the train immediately, and the bell had been cut out by the Southbound limited, and was not ringing when I got back to the crossing. The Southbound local started it to ringing again, and as the local did not go over the crossing at Riverton, the bell continued to ring until the Northbound limited came along, which was a half hour or a little better afterwards. Northbound train stopped the bell ringing as it passed over the cut-out North of the crossing: I made no particular examination of the county road at the crossing. I saw fresh skid marks on the road, but did not pay any attention to the length of them. I don't believe I have much idea as to the length of the skid marks, but am positive they skidded 20 feet. I know that from a glance that they were that much, but I did not make any examination of the skid marks at all. I do not know why I drew my head back into the car upon seeing the auto except that I saw that there was going to be a collision and I did not want to get any closer to it than I was. The motorman and I went down to the train that we had ridden on and there found that the front right hand step was broken and the pilot hanger, or brace, or hanger, was broken, and we had to take the pilot off. The pilot hanger is an iron hanger about 3 inches in width and one inch in thickness; this was broken off on one side. This is right close to the front end. The pilot goes out to the front

end of the car just about even with the front of the car, and this hanger is back a little farther,—far enough to be used as a brace and hanger together. This hanger is fastened on the beam, say a foot and a half or two feet from the front end. It was the one on the right hand side that was broken. It is one continuous iron bar that runs horizontally and then the ends are bent up at right angles and fastened to the side of the car, and then down below the flat iron is the pilot fastened or bolted on, and it was the right hand side of that iron bar or pilot hanger that was broken. This pilot is sometimes called a cow-catcher, and is made mostly of wood. It was not broken, only the hanger."

#### Cross-examination.

"The train was about 50 or 55 feet from the crossing when I first observed the automobile, and I was sitting with my head out of the window. I did not notice right at that time how many were in the auto. I did not notice one of the occupants standing up. I observed the two long and two short blasts of whistles just after we passed Allentown, because I was used to them day after day, and always noticed such things. I would have noticed it if the whistles hadn't been blown, and I noticed if they were blown. These were blown just after we left Allentown, which is about a quarter of a mile from Riverton, and the next whistle that I heard was just before the accident. These were either three or four blasts, and the auto was 50 or 55 feet

from the crossing. I did not notice any buildings beyond it, although I was famliiar with Mr. Rosenberg's store and the freight shed. The auto was a little East of Rosenberg's store when I first saw it, about 35 feet East of the store front. I did not notice the auto wheels and I did not notice whether the occupants appeared to be conscious that they were approaching a train, and I could not tell whether the chauffeur appeared to be stopping the car or not. I came back immediately and saw the auto. It was then back in towards the freight shed on the South side of the county road West of the tracks, about 10 feet West of the rail, turned about parallel with the tracks within a foot or two of the freight shed, and then I noticed Mr. Rosenberg, who was about the only person around there that I knew. I noticed a lady with Mr. Rosenberg. I did not see an automobile on the East side of the track or any other automobile there besides the one damaged, nor did I see a delivery wagon with a span of horses attached to it, nor did I notice a team approaching the crossing as we were approaching. I did not notice the exact distance between the end of the skid mark and the track, but it did not extend clear to the track. I should think there was about 10 or 11 feet between the track and the skid mark. It may have been as much as 13 feet. There was a good deal of excitement there at the time. The Northbound limited came along about a half hour afterwards, and I stayed there until it came. I did not notice the young boy who just testified being there,

nor did I notice the young man who just testified, nor did I notice him on the smoking car. He must have sat in the seat ahead of me, according to his description. I remember that there was somebody in the seat ahead of me. I don't know whether he had his head out of the window when I had mine or not. I did not notice that."

### LEWIS STABLER, WITNESS FOR DEFEND-ANTS, TESTIFIED AS FOLLOWS:

"I reside in Seattle, Washington, and am a chauffeur; have been such for nine years, and have driven the principal makes of cars and very near all of them, such as Packards, Pierce Arrows, Sterns, and have driven more private work than I have company work. I drove 8 months for Attorney John Hart, of Seattle, who has a 4-passenger Stearns car. I am familiar with the point where the county road crosses the tracks of the P. S. E. Ry. at Riverton; have passed over it many times. Last Summer I passed there at least 4 or 5 times a week, that is a round trip, both ways, and when I was working for Mr. Hart I used to cross it twice a week. I believe I crossed it in July, 1912, but cannot say positive. If a 4-seated Stearns automobile should be approaching the Riverton crossing on the county road coming towards Seattle from the Westerly side of the tracks and should skid 30 feet coming to a stop, with the front wheels very near but not quite on the first rail of the first track, there being 4 persons in the automobile, I should say that the automobile was then running in the neighborhood of 30 miles an hour when the wheels began to skid, and with the same kind of a machine, with 4 passengers, approaching the crossing at Riverton, driving towards Seattle and on the Westerly side of the track, and if the auto came within 25 or 30 feet of the track and was running at 12 miles an hour, it could be stopped within the length of the car or about 12 feet."

#### Cross-examination.

"The grade at the crossing in front of the store I should judge was 4 or 5 per cent, but after you come down closer to the track it is practically level up close to the track,—that is for about 40 feet. If the evidence should show that the level portion was a distance of 23 feet back from the track and that the grade from 23 feet West is 4 per cent, that would not change my opinion as to the rate of speed that the car was going. Four per cent on a macadamized road makes practically little difference in stopping the car, and I think I could stop as quickly on a 4 per cent grade as I could on a level. A 60horsepower Stearns automobile weighs between 4000 and 4500 pounds. The shipping weight is in the neighborhood of 4000 pounds, and when it is fully equipped with gasoline and tires, it won't go over 4500 pounds. I know that because I have weighed that class of cars. I am judging the shipping weight of the Stearns from their catalogues. The Stearns sales agent claims 4200 pounds for their car, but I

am not familiar with the actual shipping of such car and my estimate is based entirely on the statements of its agents and salesmen. The gasoline weighs between 6 and 8 pounds to the gallon, I should say 7 pounds, and a 4-passenger Stearns has a 25-gallon tank, and filled it would weigh 150 pounds, and the water in the radiator weighs 50 pounds. The weight of the extra tire depends upon whether it was a demountable rim or loose tires. Both classes are used on 4-passenger Stearns cars. The demountable rims and tires mounted would weigh in the neighborhood of 50 pounds each, and if there was not a demountable rim, it would be 30 pounds. The equipment and tools weigh something. I am now driving for the Puget Sound Traction, Light & Power Company, one of the defendants in this action, and have been in its employ about 14 months as a chauffeur. I have no relatives in the employ of the defendant."

# RALPH BRESSLER, WITNESS FOR DEFEND-ANTS, TESTIFIED:

"I live at Renton. My business is that of conductor for the Puget Sound Electric Railway. I have been in the employ of the company since 1907, and for the last year and a half I have been a conductor, and was such on July 25, 1912. I was at the Riverton Crossing about the time that Dr. Rininger lost his life. I was conductor on the Northbound limited and they flagged me. We probably arrived there 20 or 25 minutes after the accident

happened. Our train was coming from Tacoma to Seattle. When we were coming North we were flagged at Riverton, and I went out to see what the trouble was and the motorman said there was an accident. The gong on the West side of the track was ringing, and this would be cut out by a little rail on the North side of the track when the motorman ran over it. We stopped on the South side of the county road, and remained there probably a half minute, and then crossed over on the North side so as to cut out the electric bell. During the time my train was standing on the South side of the county road the bell rang continuously and not intermittently. That bell is about 12 inches in diameter. On a clear day one can hear the bell from eight to ten hundred feet."

#### Cross-examination.

"I never took any observation to ascertain how far one could hear this bell West of the crossing; have never been on the county road East of the crossing. I have made observation about this bell from the fact that we have the same bell at the town where my folks live, and as I have been coming from home I have heard it, and the physical conditions of the country are somewhat similar except that it is obscured more so than the county road would be at Riverton by buildings, trees and bank, but I have never made any observation of this particular bell except while on the tracks. We were there at the crossing altogether not over 3 or 4 min-

utes, and when we crossed over to the North side that cut out the bell, so that the bell rang from the time that we stopped until we got across and cut it out. I am acquainted with the members of the crew that were on the Southbound limited, but am not related to either the conductor or the motorman. I have talked with nobody about this matter, not even Mr. Tait, whom I never saw until I came into the hall last Saturday when I was subpoenaed, and I did not talk with him then. I don't know how they came to subpoena me. I didn't know anything about the trial coming on until I got a notice and came up here last Saturday. Mr. Jackson probably knew that I was the conductor on the limited and wanted me for that reason. This gong is about 12 inches in diameter, and has a screen over it to protect the bell, and there are five red lights on the top. These were burning at the time. I noticed them because the motorman, when I started to get out, said 'I will cross the crossing and cut out the bell," and I glanced over as one naturally would, and the red lights were lit. We carry a gong on the cars of the Interurban. I don't know the size of them, as they are down under the front end of the car and are operated by air, and I don't know that I ever saw one. These bells would probably not make as loud noise as the one at Riverton, as it would probably not have as heavy a hammer, and on account of the air working it it rings much faster and much quicker; it is a continual ring,— a good deal like an alarm clock. The air operates the hammer more rapidly than electricity, as the heavy gongs are made with a slower, heavy beat. I mean by that that the hammer would tap the bell more frequently when operated by air than it would by electricity.

### R. W. ROBSON, WITNESS FOR DEFENDANT, TESTIFIED AS FOLLOWS:

I live in Tacoma; am a motorman for the P. S. E. Ry. Company and have been for three years. I was the motorman who operated the train that collided with the automobile, in which Dr. Rininger was killed. In operating that train I stood just behind the controller or just behind the very forward end of the car, in front of the smoking compartment, on the right hand side at about 4 feet above the rail. As I was approaching the Riverton Crossing I whistled the crossing whistle shortly after leaving Allentown. This whistle consisted of two long and two short blasts, and was perhaps 800 or 900 feet from and approaching the Riverton Crossing with the current off, so that the car drifted around that curve. In working power around there it makes a kind of jerk on the rear end and it is apt to unseat the passengers in the parlor car, so I was simply drifting around without the use of any power at about a rate of 30 or 35 miles an hour. I did not see the automobile until I got within 50 or 80 feet of the crossing, and I was then running at about 30 or 35 miles an hour. When I first saw the auto, it was about 50 feet from the track. It appeared as if it came right down to

me as I got there. On account of the high bluff you can't see back from the crossing any considerable distance, and just as soon as I got to the point of the bluff I saw the auto, which I should judge was going as fast as I was, and as soon as I saw it I smashed on the emergency air and grabbed for the whistle cord, as that was all I had time to do, and there was nothing else that I could have done, as the current was already off. In order to apply the emergency brake I had to move a handle about 6 inches in from the position in which it then was, which was just one simple motion of the hand, and this sets the air in the emergency brake. At the same time I grabbed for the whistle and from the time that I applied the emergency brake, the car ran about 300 feet before it came to a stop. The car struck the front end, the right, front corner of the automobile, which, as it approached the track, kind of turned diagonally toward the train, and it was the right front step and the right corner of the pilot beam of our car that struck the auto. The pilot beam is a large iron beam supporting the pilot or cow catcher, which is carried by the wide iron beam, and the right hand lower corner of the pilot was struck. I could not say whether the auto had come to a stop when we struck it or not, and I did not notice any of the occupants of the auto before the collision. I just saw the auto with people in it. and I don't know how many, it was so guick that I did not notice how many was in it. The rail and braking equipment were in the best favorable condition for making a good stop, and it was absolutely impossible for me to avoid a collision after first seeing the auto. From my experience as a motorman on crossings and trains of that character, a good emergency stop for a train running at 35 miles an hour is from 350 to 400 feet, and I actually stopped in about 300 feet. The number of my coach was 523 and weighed 43 tons, and was 55 feet 6 inches long over all. I don't know what was its seating capacity. I think we had about 40 passengers at that time. When we came to a stop I got off and went back to the crossing, and in about 15 or 20 minutes after we stopped the Southbound local pulled in, but when we stopped we had passed the cut-out switch on the South side of the road, and when I got back the danger signal at the county road was not ringing, but it began to ring when the local came in, and the local stopped on the North side of the county road, and the bell rang until the Northbound limited came along and cut it out. This would be done by the limited pulling across the county road on the cut-out rail on the North side of the road. I did not notice any skid marks on the road. In addition to my experience in operating electric trains for the P. S. E. Ry. I worked two years for the Spokane Inland Railway, which is an electric line, operating electric and steam locomotives, and I fired about nine years on a steam road, on the Chicago & Alton, and I ran an engine about 17 months on the Oregon Short Line."

#### Cross-examination.

"I should judge Allentown is 1200 or 1500 feet North of Riverton. I don't know the exact distance. I never measured it. When I blew the crossing whistles I should judge I was about 900 feet North of the Riverton Crossing, as I blew it shortly after I passed Allentown Station, which was less than a minute afterwards. I blew it shortly after the motor got by, as it would not do to blow it while the motor was at the station, but we did not stop there. We made no stops after we left the city limits until the accident occurred. I slowed down in crossing the bridge to a rate of from 12 to 15 miles an hour, and when I passed the quarry station we were going 30 or 35 miles, and between 35 and 40 miles when we passed Allentown, which would be about 1200 feet North of Riverton. I threw off the power just after leaving Allentown. The curve of the track there is sufficient to decrease the speed of the car when it is drifting under its own momentum, but I could not state how much it would decrease the speed, probably 5 or 6 miles an hour. I have operated trains over that track eight times a day for the last three years, and cannot state accurately how much the speed of a car would decrease by drifting under its own momentum, but somewheres between 5 or 6 or 7 miles an hour. When I first saw the auto I was 50 or 80 feet North of the crossing. Upon defendants' exhibit A, I would say that I was at the lead pencil mark "C" when I first saw the auto. It was then West of the track at the point marked letter "R" on exhibit A, and was going toward the track. I have examined plaintiffs' exhibit 1. I notice the Allentown platform shown thereon, and the place marked in red pencil "A" is the cut-in for the current. It was after I had passed that point about 300 feet when I gave the signal whistles. I could not estimate the number of seconds. I was not conversing with anybody between the time that we left Allentown and the crossing, but just about the time that we struck the Riverton Crossing, the conductor came in just before the accident happened. I did not look up to see him when he came in. I was too busy,-I did not look to see who came in. I have had no experience at driving automobiles, and never owned one. I am not able to estimate the speed at which an auto is driven only judging by other objects and would not give an accurate estimate. The moment that I saw the auto I busied myself with attending to the emergency brake and the whistle cord. When I saw the auto I slammed the air on and backed my back up against the wall and braced myself, as we only have to open the glass in front of us. I didn't ring the bell on my car as I didn't have time to. It is operated by air. I testified at the coroner's inquest that was held the next day after the accident, and the testimony that I gave at that time was true. I had been working as an extra man at the time of the accident. I did not do extra work but I handled the regular runs when the regular men laid off. Before the coroner's inquest I testified that when I first saw Dr. Rininger's car it was possibly 50 feet from my train and that his car at that time was right on the crossing diagonally facing my motor." Q. Did you testify as follows at this inquest: 'Q. Why could you not see that car when you were more than 50 feet from the crossing? A. Because when you are that distance back the bluff keeps away the view of the road; you can't see an object back from the crossing in a direct line with the road over 25 or 30 feet away from the track on account of the bluff'?-did you testifly to that effect? A. I did. Q. That is correct? A. It must be. (Continuing.) I also testified that the occurrence happened so quickly that I didn't even know that the auto was stopped; I saw the front wheels turned right to me, and we were on them, and I slapped the air on the minute the car came around the bluff, and my power had been shut off for 200 feet before that." Q. Did you testify as follows: 'Q. What warnings did you give that you were approaching that crossing? A. Two long and two short blasts of the whistle. Q. How far from the crossing? A. Possibly 800 feet. Q. You had a bell? A. Yes, sir. Q. You didn't ring that? A. Yes, sir. Q. You were ringing your bell. A. I was ringing my bell when I hit the automobile' did you testify to that? A. I did. Q. And was that true? A. I am not just positive now whether or not I got that bell ringing before I hit the automobile or not; I would not be positive. It was done so quick that I do not remember. My bell is operated by a little valve right alongside the brake valve. I do not remember now whether I started the bell or not. Q. At the time you gave the testimony before the coroner's inquest, it was the next day after the accident? A. Yes. Q. And it is probable that your recollection was better then than it is now? A. Probably so, yes sir. Q. Did you give this testimony at the inquest: 'Q. How long had you been ringing your bell before you hit the automobile? A. When I slammed the air into the motor. Q. What distance is that from the car? A. Possibly 50 feet.' Did you testify to that at the inquest. A. Yes sir. Q. And that is probably correct? A. Yes. (Continuing.) "I also testified that I had shut off my power before I got to the crossing. There is no down grade on the track there, and the power had been shut off 200 or 250 feet before we got to the crossing,—I could not say positively just where I shut the power off, but I know I shut it off shortly after leaving Allentown. It is probable that my recollection was better then than now, and it is probable that I was more correct then than I could be now, because of the fact that it was very distinctly before me, and the occurrence was so close to the date of the examination, and it may have been that I shut off my power about 200 or 250 feet before I got to the crossing, and it may have been a little farther. I can't be positive. I also testified at the inquest that with the power shut off I was still going something like 35 miles an hour. I think that is correct. I think I shut off the power

shortly after I blew the whistle. I would not undertake to say at what rate the auto was proceeding when I saw it. I simply judge its speed by the speed of the train, as I think he was going about as fast as I was. I didn't have time to get excited when I saw him; it was done so quickly, in just an instant. There was just about a second's time between seeing the automobile and the accident. I noticed the location of the automobile when I came back from the car. It was standing at a point that I will mark on exhibit A, almost parallel with the track, and the front wheel slightly toward the track, perhaps 6 to 8 feet away from the track; the rear wheels were back perhaps within about 10 feet of the freight platform here, so that there was between 8 and 10 feet between the rear wheels and the platform. I don't know whether the wheels of the auto were damaged. I didn't pay much attention. The tires seemed to be pulled off the two front wheels. After my recollection is refreshed from the evidence that I gave at the coroner's inquest, I can't just say whether the auto had come to a stop before we struck it or not, because I do not positively remember. The minute it came into view I slammed the air on the motor and we met right on the crossing; it was done so quickly I could not say positively whether they were moving or not when we struck them. While I testified at the coroner's inquest that it had stopped, I cannot say whether that was correct or not. I didn't have time to notice the occupants in the car. At the time the car struck the

automobile, I was standing at the controller with my back up against the front compartment of the smoker and my knee against the controller in that manner, and as I remember I threw one hand up to protect myself from glass in case it came through the window. That was on the right front corner of the vestibule next to the auto. I did not stand on the left side at the time of the impact. I do not know whether I could have seen the auto when my car was 133 feet North of the crossing or not. I have never observed how near the crossing one must be in the county road in order to see a car all the way on the West track to Allentown, and I do not know how far West of the track you could see an auto when you were 133 feet North of the crossing, but I should think one could when 50 or 60 feet away. I am now running six times a day over this crossing and formerly ran eight times."

### ISAAC GRIBBIN, WITNESS FOR DEFEND-ANTS, TESTIFIED:

"I live at Milltown; am now, and have been for six years, a conductor on the P. S. E. Ry., and was the conductor in charge of the Southbound train that collided with Dr. Rininger's automobile. I remember that there was the regular road signal given by the motorman before reaching the Riverton crossing, consisting of two long and two short whistles, and I think the train was a little past Allentown, which is in the neighborhood of 3000 feet North of there. I should think the train was

running between 30 and 35 miles an hour as it approached the Riverton Crossing. The electric gong was ringing when we passed over the crossing, and I should judge that our train ran about 200 feet South of the crossing before it came to a stop, and the bell did not continue to ring after we passed the cut-out just South of the county road. I saw the automobile just before the collision. I had opened the front door of the smoker to go out on the front platform. The train was probably then 20 or 25 feet from the crossing as I opened the door and saw the front end of the automobile. The automobile was then right along side of the track. I could not say whether it was moving or standing, but I saw the front end of it. It seemed to be headed toward the rear of the train. It could not have been a second from the time I saw it before the train struck it, and as the train came to a stop I jumped off and ran back. The electric bell was not ringing but it rang while I was there when the local pulled up behind us some 15 minutes afterwards. The local stayed there probably 30 or 35 minutes, and the bell ceased to ring when the limited from Tacoma pulled in across the crossing to the cut-out on the North side of the crossing, which cut the bell out. I made no examinations to see whether or not there were any skid marks on the road, and knew nothing about that.

#### Cross-examination.

"Our car was delayed at the crossing something over an hour, and during that time I was helping

take care of the wounded and getting hold of our dispatcher, flagging the local train and helping to get our motor ready to move South. I did not observe any skid marks on the road-I did not take any notice—and saw no other automobiles there, nor any team at the time of the accident, but I saw a couple of automobiles come in from Seattle. How long afterwards I could not say. I did not see a delivery team or any team that I remember of West of the West side of the track. I should judge the Allentown Station is 1200 or 1500 feet North of Riverton, and it is about the same distance between Allentown and Quarry. It was my duty to collect the tickets and fares from the passengers and I had a fair sized load that day. I do not remember the number, but I should judge we had 35 or 40 passengers. I had completed collecting the fares when we reached Riverton. We usually got through before we left Georgetown. I went into the front vestibule of the car because we exchanged identification slips at Renton Junction while the train is running, and I wanted to fix my hook to throw off my slip, which is thrown off from the front end of the moving car. As a rule they slow down a little for that. We had not yet reached Renton Junction, and I went in the front vestibule to be prepared to exchange such identification slips. Renton Junction is 2 or 3 miles farther South of Riverton. We exchanged by handing the hook off to the operator and he hands one to me. The motorman has nothing to do with this. When I went in

the front end the motorman did not look around to identify me or see me come in, and the moment that I got in the vestibule I glanced out and saw the automobile, and the car was then, I should judge, 20 or 25 feet from the crossing. I did not hear the motorman blow any whistles there. At that time the auto appeared to me to be right along side the track. I could not tell whether it had stopped or was moving, as it was faced towards us, and it was the overhang of the car or the attachments to the overhang of the electric car that struck the automobile. I did not see any passengers in the auto. All I saw was its front end. I heard the bell ringing as we approached the crossing 25 feet from it. I only heard one bell ring, which was the signal bell. I testified at the coroner's inquest which was held the next day after the accident when the events were fresher in my mind than now. As I opened the front door of the car, the motorman slapped the air on. At the coroner's inquest I testified that I was in the front end with the motorman, as we registered a slip at Renton Junction. I opened the door and turned around and glanced out of the front door and saw the auto and he slapped the air on immediately, and that was correct. I also testified that I should judge that we were not over 15 or 20 feet from the auto when I first saw it, as it happened so quick I had no time to realize anything; that the brakes and air were applied when we were within 15 or 20 feet of the auto. It might have been a little bit more than that. I further stated that I did not know any reason why the motorman did not see the danger of this collision until he was within 20 feet of the car except on account of the obstruction of his view. As I entered the door the motorman may have taken his eyes off of the crossing to look at me, but I do not know whether he did or not. I have not talked this matter over with anyone since I gave my testimony before the inquest, and the events are not as fresh in mind now as they were at that time, and it is probable that I could have been more positive then than now. When the whistles blew at Allentown I was in the middle of the car close to the front end back of the smoker. My recollection that the whistle blew at that point is due to the fact that it is the custom and I also remember distinctly of hearing the whistles and glancing out of the window at the same time. I did not hear any whistles after that, not even when the collision took place, and yet I was in the front end, and it would have been an unusual occurrence for the whistles to have blown at that crossing unless something had happened, and if the whistles had blown right at the crossing I would have realized that something had happened if I had heard them. When I was in the vestibule, the whistle was up over my head about 4 feet. It makes a loud, distinct noise, and on a still day can be heard quite a distance, for a quarter of a mile or a half mile, and yet I did not hear it blow at the crossing, as I would not have heard it because I was pretty busy about that time getting the door shut and trying to get

the side door open to get off. My mind was pretty well occupied, and if I heard the whistle it has slipped my mind. At the inquest I testified that the motorman had said nothing to me about this collision, but I have since talked with him, and Mr. Robson told me he had not seen the auto until it was right on to them."

#### Re-direct Examination.

"The bell that I heard as we passed over the county road was the electric danger signal that stands on the side of the road. I do not know whether Mr. Robson, the motorman, took his eyes off of the crossing in front of him and turned around to look at me, as I came through the door, or not. The report of my testimony given before the Coroner's inquest in which I am reported as saying, 'When I opened the door he took his eyes off the crossing and turned around to see who it was,' I do not think is correct, and in preparing this identification slip to throw off at Renton Junction, it is thrown off through the side door on the front end of the left hand side of the car, which would be on the opposite side from that on which the automobile was standing or coming, and as I got on the platform and opened the door I was facing South, but the moment I saw the automobile I turned and shut my back door and started for the side door and got off there. This door is a sliding door between the front end of the car and the smoker, and the moment that I stepped on the platform I turned facing the sliding side door for the purpose of closing it. I then turned facing to the left, to get out the side door on the left hand side, so that my side was towards the track ahead of me; I had not opened the side door before the collision, but I opened it afterwards just as soon as I could get it open, and then jumped off the train and ran back to the crossing before the train came to a stop."

#### Re-cross Examination.

"I only heard one bell ring and at that time I was not very busy getting off the car; was just opening the door to get on the front end, but I did not notice the distance that I was then from the bell,—in fact I could not say because the door was shut, but we were close to the bell. I could not say how far the bell was from the car, and I should judge we were just pulling by the platform that is there when I started to open the door. There was a gong on the car, which was practically under me when I was opening the door."

### NELLIE M. RININGER RECALLED ON BEHALF OF DEFENDANTS.

"I am the surviving widow of Dr. Rininger."
Q. I would like you to state whether or not his estate has been finally distributed to his heirs. (Objected to as irrelevant, immaterial and incompetent. Objection overruled, and exception noted.) It has. (Continuing.) "He left no heirs besides myself and my daughter, but he left two bequests to his sis-

ters. My daughter and I have received the balance of the estate after paying the two bequests." Q. I wish you would state what the estate amounted to which you and his daughter received. (Objected to as irrelevant, immaterial and incompetent.)

"The COURT: Objection overruled. Gentlemen, you will understand that this is simply a circumstance in determining the amount of the damages that the plaintiffs in the case may have suffered by the loss of the Doctor. It is one of the circumstances which you will take into consideration, because when a man is living what the plaintiffs in this case received from him would necessarily not be a part of what he left to them."

(Exception noted.) "We received notes to the value of \$60,000. These are the mortgage notes, the balance due for the sale of the hospital, which we sold at less than its value, and we received the notes in the distribution. I also received \$5,437, and there was the bequests of \$2,500 that he had given to each of his two sisters, which was taken from the share of the little girl, and there was \$137 besides his book accounts, which are still on the books, something like \$30,000, so that the little girl and I received together the \$60,000 or notes which are secured by a mortgage on the hospital property. I own half of it and the little girl owns the other half. In addition to that I received \$5,000 in cash as my share was more than hers, because each of the Doctor's sisters received \$2,500 apiece, it being community property. The fees of the executors

and attorneys were paid and the amount deducted from the estate before its distribution and before I and my daughter received the shares I have spoken of. This is all that I received from the estate outside of the life insurance which I got at the time of his death."

#### Cross-examination.

"The life insurance that I got was a small amount, and that life insurance of \$45,000 went to help pay the debts of the new hospital building, which was in the process of being built at the time of the Doctor's death. We had given up our home and the Doctor was building this private hospital for his private surgical work on the corner of Summit and Columbia in Seattle. It was not finished at the time of his death, but under roof and the office partly finished. We finished it up and I had to sell it, and this \$60,000 represents the unpaid portion of the purchase price. The little girl was 14 years of age on February 2nd of this year."

(HERE DEFENDANTS REST.)

## ELORA LAMB, RECALLED ON PLAINTIFFS' BEHALF, TESTIFIED:

"I have heretofore testified that I had frequently been on the platform of the passenger station at Riverton waiting for the Interurban trains prior to July 25, 1912. During that time I had occasion to observe the operation of the electric gong on the post at the crossing. During the years 1911 and 1912 I had been at this station once a week, as

I was going home to see my parents, and before the accident, while I had been waiting for cars to come back to Seattle late at night I would be in the waiting station, and if the gong did not ring I would have no way of telling when the car was coming, so I know it did not ring regularly at times. I remember times when the approaching car did not ring the bell, and this was a couple of months before the accident. I have noticed more than once before the accident that the bell failed to ring. I have also noticed that the bell rang irregularly and would only ring a tap now and then as the cars approached. I noticed that when a Northbound car came in, which would be 700 or 800 feet before it came to the crossing, it would then cut out a little ways on the other side of the crossing, and when the car got down to Allentown the bell would start ringing again when there was no Southbound bar approaching. I also observed that the bell would work intermittently, that is it would ring a few taps, then stop and then ring again. I noticed this during the year 1912 before the accident. During the year 1911 when I observed the bell ringing iregularly there was with me Mr. Roy Percy and his brother, Frank Percy." Cross-examination.

"There were other occasions besides the one referred to two months before the accident when the electric gong failed to ring on the approach of a train, but I could not state the date. On the occasion two months before the accident when I observed that the bell failed to ring, it was the 11:12 train

at night and I missed it. It was the local. I wanted to take the 11:12 Northbound train to Seattle on a Sunday evening. Mr. Roy Percy was with me. He is not in court. Neither of the Percy boys has been in court during the trial. At the time, just he and I were in the waiting room and were talking. This waiting room is on the East side of the track and on the oposite side from the bell. The door of the waiting room was open—there is no door on it. I can swear positively that on that occasion two months before the accident that a Northbound train came there and the bell did not ring; I did not hear it at all and I missed my train by it. I was seated right where I could see the lights and looked to see if they were burning. I could not hear the train coming from the inside of the station. When the train approaches it makes as much noise as the bellwhen it gets so close that it won't stop, and I missed my train that night. This little station sets back from the East rail and is shown on Exhibit A, and appears by the square place on the platform marked "Depot," and the electric bell is shown also on the plat. The width of the platform is about 12 feet, and the train coming from the South on the track passed right by the platform. The windows in the station were closed. They don't open, and there was no door there at all, and I didn't hear the train until after it got past. When the train got as close to me as the distance from where I was to the bell it would make as much noise as the bell, and would then drown out the sound of the bell."

### MRS. RININGER, RECALLED, TESTIFIED AS FOLLOWS:

"I desire to correct the statement in my testimony given this morning, as I did not intend not to describe all of the property. There is some real estate that I did not mention. It was not divided. There is a lot at Lincoln Beach, one at Georgetown, and two at Bremerton. There is also some bank stock worth \$2600. I estimate the whole as worth about \$10,000."

### W. H. MORRIS, WITNESS ON BEHALF OF PLAINTIFFS, TESTIFIED:

"I live in Seattle. My occupation is lawyer; have been practicing in this city twenty-three years. I knew Dr. Rininger during his lifetime. I was present at the scene of the accident shortly after it occurred. I observed some skid marks on the highway just West of the crossing. This was on the West side of the Interurban railroad track, and in coming from the West of the track the skidding would be, in my opinion, nearer to the right hand side of the road than the left hand side. My wife, one of my sons, some company and myself were going out South of Riverton, and as we neared the Riverton junction I saw and recognized Dr. Rininger's car. There were a number of persons standing around and I alighted from my car and immediately learned that Dr. Rininger was killed. Then I turned my automobile to this particular track. I did not measure the skidding but stepped off the distance from where I should judge, if the car were going in an Easterly direction, it would be the West wheel commenced to skid, and from the place it commenced to skid, as far as I could follow the demarcation, it was seven steps, and I should judge that I stepped about three feet, so that I should say the length of the skidding was 21 or  $21\frac{1}{2}$  feet. If this machine that skidded was coming in from the South, the skidding was on the left hand side, or the left hand wheel, and the place where the brake was applied was light and as the car continued to travel it seemed as if the casing had burned into the ground so that it was very plain to be seen."

#### Cross-examination.

"It was probably 4:00 to 4:30 o'clock when we reached the Riverton Crossing, and there were 7 or 8 people there at the time. When we reached the crossing I don't think there was any Southbound train standing on the North side of the county road. One may have come in while I was there, but my impression is that it did not. The reason I think so is that my attention was directed to Dr. Rininger. I went out on the track and walked up to the little shed and removed the tarpaulin from off Dr. Rininger as he was lying with his feet down hill, and looked at his face, his clothing, and if there had been a train there I think it is very probable I would have noticed it. While I do not recall any train coming into that crossing while I was there, it may have occurred. We were there from 10 to

15 minutes, and then we continued our journey down to Mr. Wolf's. The road was dry, but there was not so much dust at this particular place; the roadbed was pretty solid. On the right-hand side of the road as you come in from the South I think the dirt was softer than it was on the center of the road. I do not think that it was possible for the 7, 8, 10 or a dozen people who were there to have obliterated or obscured a portion of those skid marks. I don't think those skid marks had been touched. It seemed as if everybody was standing back and speaking about them and pointing them out. They were rather being protected instead of being destroyed or defaced in any way. To the best of my recollection the Easterly end of the skid marks came up within an automobile's length of the Westerly rail, and then they were abruptly broken off. I did not see the limited that collided with the automobile. I don't think it was there at the time. I do not know anything about the train that collided with the automobile, although I understand it was a train going from Seattle to Tacoma, and was a one-coach limited. I do not remember that I saw a train standing South of the county road while I was there, and if it were South of the crossing it was some distance farther South than where Dr. Rininger's body was lying, and it may have been there and I didn't pay any attention to it because my mind was centered upon Dr. Rininger. In all the time that I was there I do not recall seeing any Puget Sound Electric Railway car either

North or South of the crossing, though it may have been there and I did not pay any attention to it."

#### Re-direct Examination.

"It is very probable that if a coach were 200 or 300 feet South of the crossing and beyond the freight shed that I would not have noticed it. In the first place, when I walked up there I was told Dr. Rininger's body was down there, and I thought the man meant that it was in the hollow, and I walked down to the hollow and I looked around and I could not see anything, and then I asked him again where it was, and he pointed over under the shed, and then I walked down the road to the car track, and in walking up along the rails, passing the cattle guard, stepping over that, I watched the condition of affairs, the effects the collision had upon Dr. Rininger's body and the things that were along there and the clothing; I was watching that particularly, and when I reached the shed, I discovered his body; my eyes were centered upon that, and after I finished looking at him I turned around and walked back, and I paid no attention to anything else. There might have been a dozen coaches standing scattered around there and I would not notice them. I knew Dr. Rininger very well during his lifetime, and saw him that afternoon previous to leaving Seattle. The first knowledge I had of the accident was when I saw the car backed off on the right hand side of the road as you come from the South. The effect of the knowledge of the accident to the Doctor is something that I do not believe any human being can explain or describe. I was not excited. It was the reverse."

## N. N. STEVENS, WITNESS ON BEHALF OF PLAINTIFFS, TESTIFIED:

"I have been a photographer for 15 years and resided in Seattle in July, 1912. I recognize this picture designated as Plaintiffs' exhibit 14, as I took and made the picture on the night of the accident, and it is a true and correct representation of what it purports to show. I was out there for the purpose of taking this picture, and did not notice any skid marks of the wheels of an automobile on the highway at the Riverton crossing. I was not interested in that. I was out there to make a picture for the paper and that was all I was interested in, and of getting the best picture I could from the newspaper standpoint, so I cannot say anything about the skid marks. We left here a little after 6 o'clock and drove out in a machine, and it must have taken us a half hour to drive out there, as we drove pretty fast, and it was probably two hours after the accident when I got there. I do not know that the automobile was in precisely the same position as it was immediately after the accident."

### O. C. THOMPSON, WITNESS ON BEHALF OF PLAINTIFFS, TESTIFIED:

"I am running a store out near the Riverton Crossing, and have been for about 7 years. I have lived out there 8½ years, and have been familiar with the Riverton Crossing for 8 years; have been familiar with the alarm or warning gong maintained on a post just North of the highway and West of the tracks for  $2\frac{1}{2}$  or 3 years, and since it was erected. I have observed that during the year 1912, and before this accident, irregularities and failures of this gong to ring when a train was approaching. At times the bell would not ring at all when a train was approaching or otherwise, and at other times it would ring when there was no train coming or otherwise. The bell has been plugged by people living nearby there so that it would not ring at all because it kept ringing at night and kept people awake. At other times when the train approaches the bell starts ringing and after it makes the crossing it stops, and then when the train is a thousand feet past the crossing it rings for about 2 seconds and then it stops. I have noticed that this bell would fail to ring when trains were approaching and would continue to ring after it was cut out by the train that went by quite frequently during 1912, and before this accident."

#### Cross-examination.

"I have lived out there  $8\frac{1}{2}$  years. My store now is about a block from the Riverton Crossing, and it has been for the past four years. It is the Southbound train that disconnects the ringing and then starts it again after it passes the crossing a thousand feet. I have heard and did hear during the

early part of July, 1912, between the first of January and the 25th of July of that year, the Southsound train start the bell to ringing when it was about a thousand feet North of the crossing, and when the bell was in working order it would ring continuously until the Southbound train passed over the county road. I believe the cut-out is right at the crossing of the Southbound track. It starts about a thousand feet South of the crossing and the cut-out is immediately South of the county road for the Southbound trains, and when the Southbound trains would cross the county road and come in contact with the cut-out immediately South of the county road, the bell would cease ringing and it would not ring any more until some other train approached. I could not give the dates when within a month prior to this accident I saw a Southbound train coming and the bell did not ring at all before the train passed the crossing, but I actually observed quite a number of times between the first day of January and the 25th of July, 1912, a Southbound train approach when the bell failed absolutely to ring, but I could not say definitely how many times. I do not know whether there were any trains at or near the crossing. There might have been. I do know that the bell has stopped ringing when there was a train at the station and another coming. I have noticed that; but the times I have enumerated as the occasions when a Southbound train would fail to start the bell to ringing was not when the bell stopped ringing by reason of a train being at the station, but I wish to testify as a fact that the Southbound train would fail to ring the bell when there was no train standing at the crossing, although I can give no dates or state how long before the accident it was or in what month, but it would not be three months apart at the time that I heard it, and I do not think I would have thought of it if these occurrences had been as long as three months before the accident. It do not believe it was as long before the accident as that."

# B. A. KRANDALL, WITNESS ON BEHALF OF PLAINTIFFS, TESTIFIED:

"I have been following the occupation of automobile mechanic for 12 years and have resided in Seattle 4 years. I began driving and operating automobiles continually in 1903, but I worked a good many different cars and operated different makes of cars and have driven in races. I am familiar with the driving and operating of automobiles on highways. I have had 5 years' knowledge of Stearns automobiles and knew Dr. Rininger during his lifetime, and was familiar with the automobile involved in this accident, which was owned by him. I helped repair it different times before the accident and after the accident I straightened it up. I think, without the extra tires, it would weigh between 4550 and 4700 pounds. At times the Doctor carried two extra tires. I have had some experience with automobile skidding." Q. I will ask you to state, if you can, from your knowledge of automobiles and the operation of them, and also from your experience in operating them, whether or not the speed of an automobile can be determined from the skid marks that it may make on the highway after the application of brakes so that the wheels are locked. A. That would be pretty hard to decide —the speed of the machine according to the skid marks. It would depend a great deal on the kind of tires that were used; the non-skid tires—there is the staggered tread tire and there is the plain tread tires, and I think on each one of those you would find that there would be a difference at the same speed in the length of the skid marks. Q. Would there be any different results from the same tires at different times? A. Yes, sir, there would. would have to be produced—for instance, I can take a machine and I can go out here rolling at a speed of say 15 miles to 20 miles an hour, and one time I would skid probably 10 feet, and I would try the same one and I would skid pretty near 20 feet at the same place. I was not familiar with the railroad crossing at Riverton in July, 1912."

#### Cross-examination.

"The Doctor kept his automobile at the Stearns Auto Company, 1409 Broadway, and I was the foreman of the shop at that time. I saw his machine almost daily, but don't recall what tires were on the machine at the time of the accident. I could not say whether he usually used non-skid tires or not. I know at several times he has used non-skid tires and

that he tried the Dayton airless tires. A non-skid tire would not skid as easily as other types. The non-skid tire would prevent a machine from skidding where the brakes had been applied so as to lock the wheels, that is if the non-skids were new. If the non-skids were worn until they happened to get down to the plain surface they would not be any more effective on a pavement than a plain tread tire, and I don't think it takes very long for a staggered tread tire to wear down to smoothness. The non-skid tire is a preventive for slippery conditions. The non-skid tire will not skid as far as a smooth tire." Q. Assuming that there was a non-skid tire that had not been worn smooth on the machine, and as a matter of fact that it did skid 30 feet on a dry macadam road, wouldn't it indicate to your mind that the machine was running at a higher rate of speed at the time the wheels were locked than would have been the case if a smooth tire had been on the machine? A. That is a pretty hard question to answer. (Continuing.) A non-skid tire will not skid as far as a smooth tire. There are things which have to be considered in a number of different ways. For instance, if your brake system is not properly adjusted one wheel will turn and the other will lock itself, and you car will have a tendency to slide one way. If a non-skid tire skidded for 30 feet it would undoubtedly indicate that the machine was going at a higher rate of speed than if both wheels had been locked and it had skidded 30 feet with a smooth tire. If we were to assume that for some 20

or 25 feet West of the tracks at Riverton the county road is practically level, and from that point back a distance of 300 feet there is a down grade towards the track of 4 per cent, and that the automobile which Dr. Rininger owned and with which I am familiar, contained 4 passengers, including the chauffeur, and on reaching a point near the track, driving Northerly towards Seattle, the automobile skidded such a distance as brought it to a stop with the front wheels very near but not quite on the first rail of the first track that you come to, that both wheels did skid a distance of 30 feet, and that it is a macadam road and that the road was dry,-it would be pretty hard to state how fast the machine was traveling. I would not like to make any statement there as far as the speed is concerned because it is very hard to know just how fast a car is going by the length it will slide. I can take a machine out on any kind of pavement which you suggest, and in one stop I will make I will skid 30 feet and the next stop I will make I will apply my brakes so that I will stop in about 10 feet." Q. Suppose you applied your brakes the same in making the different tests, with precisely the same degree of force, on the same machine, made one stop immediatly after the other, beginning each stop while running at the same rate of speed, with the same load on your machine, the pavement being in exactly the same condition, would you not make the same stop in practically the same distance? A. I doubt it, by a margin of 5 or 6 feet at the second try, as we have

proved at different times that I have entered into braking contests for different machines,-those were several years ago when they held those,—and the braking capacity of the car would vary a great deal, and you can stop in that short distance-I could mention to you different instances where we have tried it with the same car two or three different times. Now this particular car here of Dr. Rininger's I know about, because that is one thing that he insisted on and he always had his chauffeur to keep his brakes adjusted properly, so that he always played safe. (Continuing.) "I have been in the automobile business 12 years, and during that time have actually driven on the road various types, kinds, weights and characters of automobiles. now wish to acknowledge that I cannot form a reasonably accurate conclusion as to the rate of speed at which an automobile would be running if it skidded 30 feet on a dry macadam road."

#### Re-direct Examination.

"I am now examining the picture, Plaintiffs' exhibit 14, with a glass, which is the picture of Dr. Rininger's automobile after the accident, and I observe that the rear tires were plain smooth treads, as are also the front tires."

# KENT BRODNIX, WITNESS RECALLED FOR PLAINTIFFS, TESTIFIED:

"I now recall the character of the tires that were on Dr. Rininger's automobile at the time of the

accident. Both the front and the rear ones were smooth treads."

#### Cross-examination.

"I could not say how long the smooth tires had been in use before the accident. They had been on for some time, excepting one of them which was put on that day, and I knew when I started out that morning that we had smooth tires on. It would depend upon the conditions as to which kind of a tire you could make the quickest stop with. On a wet pavement, as a general thing, you can make the quickest stop with a good non-skid tire, and if the road is a dry macadam road, absolutely smooth, I do not think it makes a great deal of difference. I should think it would make no difference."

(HERE THE PLAINTIFFS REST.)

## DEFENDANTS RECALL THE WITNESS BRESSLER, WHO TESTIFIED AS FOLLOWS:

"I was conductor on the Northbound local that stopped at Riverton shortly after the accident, and got off the train. While there my attention was called to skid marks on the county road West of the tracks by passengers on the car. I inspected these skid marks while standing in the rear end of the car. These skid marks were in a straight line, and parallel with the rear end of the car, as we had backed up onto the wagon road to receive the passengers. It was about 18 or 20 feet from the rear end of the car to the end of the skid marks nearest to me. I could see them distinctly, and it seemed to me that the distance between the Easterly end of the skid marks from the point where they stopped to the Westerly rail of the Southbound track was 10 to 12 feet, and I should judge that the skid marks extended about 30 feet."

#### Cross-examination.

"I made this observation while on the car. When I first got off the conductor said they wanted us to take those two ladies into town, and I backed my train up on the North side so as to take them in the rear end of the observation car, and I opened the door to get some of the chairs out, and one of the passengers got up and he said he would help me to take the lady in. He said, "Isn't that an awful long skid for the automobile?" I looked at it and I said "Yes, it is something about 30 feet," and he said "It is all of that, if not more," and he stood there until they brought the nurse on the cot and mattress and we had her inside. We were at that point 5, 6 or 7 minutes. This morning I testified that we were there 4 or 5 minutes. Q. How far did you say the east end of the skid mark was from the track? A. I should judge about 10 or 12 feet from where I stood—say 10 feet. I do not know the length of the automobile that skidded; it could not skid any nearer to the tracks than its length unless the compulsion of the train hitting it would make it look like that. I was standing on the car, which was Northbound, and the West rail of the

Northbound track is about 10 or 12 feet West from the West rail of the Southbound track, and I was then straight with the skid marks so that the end of the skid marks was 20 feet from where I was. If the end of the skidding was 13 feet from the west rail, then I must have been 23 feet from the end of the skid marks." Q. And do you want to tell the jury that you could look at a line opposite to you beginning 23 feet from you and extending westward, or away from you, and could tell how long it is? A. Well, from only what the passenger that was down there said. (Continuing.) "I could judge about the distance. I have had no particular experience in measuring distance. When I was young I was in a machine shop, and had no experience in measuring distances. I would say that the West end of this skid mark was 50 feet from me."

(WHEREUPON ALL PARTIES REST.)

MR. TAIT: If the court please, the only remaining defendant in the case, the Puget Sound Electric Railway, now moves that the jury be instructed to return a verdict in favor of the defendant and against the plaintiffs, upon the ground that as the testimony now stands it fails to show any negligence on the part of the defendant company, and that it affirmatively appears from all of the testimony that the plaintiffs' decedent, Dr. Rininger, and the chauffeur in charge of the automobile, were guilty of such contributory negligence as to bar a recovery.

THE COURT: I am aware of the conflict of the decisions on contributory negligence and the cirsumstances under which a court is justified in determining it as a matter of law. The court does not consider it necessary to go outside of this circuit and the decisions that have been made in this circuit that are controlling on this court to determine the question.

The rule, of course, is based upon reason. The general rule is that the question of negligence and contributory negligence is a question for the jury to determine and the jury alone, but from the beginning of the decisions in our courts they have ruled that there are circumstances under which the court will determine as a matter of law whether contributory negligence has been shown on the part of the plaintiff so clearly that reasonable minds cannot differ.

As I say, this rule as to what is required of a person at a railroad crossing, is based on reason. At a railroad crossing where trains running at the speed of an Interurban or a steam train running through the country at the speed that this train was authorized in going, the person approaching a railroad crossing is bound to look and listen for their own protection. They cannot depend absolutely on the care taken by those in charge of the trains; therefore the law imposed upon them the duty of looking and listening for their own protection.

In a town, where the street cars are light and

they can be stopped quickly and they are not allowed to run at such a high rate of speed, as there are manifestly usually other things, such as pedestrians and people using the street, to look out for, that rule has been qualified, and a person crossing a street car track is not absolutely bound to so conduct himself; but the court does not understand that this rule has been relaxed so far as steam trains running through the country, or interurban trains, are concerned.

Now the rule that a person is bound to look the courts all put that first, that is, before listening, and it only requires a moment's reflection to determine the reason. That is, a person who looks and there are no obstructions, is not so likely to be mistaken as the person who listens, because a person looks along the railroad track, if he has reasonably good eyesight, and it is a clear day, and there is no obstruction—if there are any obstructions he can see them, and if there are none he can see whether a train is approaching within such a distance as to threaten him with danger. It is not so in regard to the matter of listening. The unseen conditions: this curve in the bank which has been referred to in this case, or wind that he does not calculate the strength of, may carry the sound away, and there are other things which may interfere with his hearing. But the law places upon one approaching a railroad crossing the duty to make a vigilant and diligent use of his senses, including his eyes and ears, to determine whether he is threatened with danger. If he cannot see, the law places upon him the obligation of increased vigilance and diligence in the use of his ears, and even the decisions which have been read by the plaintiffs, some of them go to the extent of holding absolutely that if there is anything that interferes, any transient noise that interferes with his listening satisfactorily, then it is his duty to stop and either inferentially go forward and look or wait until that transient noise has passed. If that noise is something he controls, like the noise of a wagon, of course it ceases when he stops.

Now, applying these several principles to this case, and especially relying on the case in the 199th Federal, the court concludes that this case must be taken from the jury. That case in the 199th Federal, Judge Wolverton uses this language—he recites that the view is obstructed, and then he says 'This imposes upon the plaintiff the precaution of stopping. Now what does that mean? That is not a recital of what the plaintiffs were testifying to. It is a recital of the principle of law as enunciated by that court, whose decisions are controlling on this court. Then the judge proceeds to review what further the plaintiff testified to and in that conclusion what the word 'imposed' means is that it lay upon the plaintiff the obligation or duty of stopping. That is Webster's definition of 'imposes'. If the court had meant to say that was the reason they stopped, the court would have used happier language than the word 'imposed,' and that is still further borne out by the cases which Judge Wolverton cites

—Judge Van de Vanter's decision in the 130th Federal and Judge Sanborne's decisions in the 181st Federal, both of which are in point. The case decided by Judge Van de Vanter was where a man claimed that he walked on a railroad track and he could not see because there was smoke and steam being blown across the track in clouds. Judge Van de Vanter said it was then his duty to stop until the wind ceased to blow and there was some rift in the clouds, or some way he could see. Now those are the decisions which Judge Wolverton relies upon in his ruling and decision in that case, although he let the case go to the jury there or upheld the lower court in letting it go to the jury—I forget how it was determined in the lower court—but the evidence plainly showed in that case they had stopped and they had looked and they had listened—they did all of the duties that devolved upon them to discharge before they drove on the railroad track, and then again the evidence was that they got within 20 feet before they could see. With a team of horses stretched out ahead of you 20 feet, at the time those sitting in the wagon box could see the train approaching if they drove out from behind the brush, those horses would be virtually upon the track, and the court seemed to recognize the difference where men are driving a team of horses where they may become suddenly frightened and do them more daniage by the passing train than if they took the chance in going ahead—certain discretion is placed in them in that emergency to use their best judgment, especially where, as in the case decided by Judge Wolverton, the man had his wife with him in the wagon box, and if he were to get out of the wagon and go ahead and desert her there would be the danger of the team running away. There are such things as that to be taken into consideration, which do not and cannot appear in this case.

Counsel has not argued anything about the condition of the road, but as a reason which he has advanced for making an exception in this case counsel has placed reliance on the fact that the chauffeur relied on this signal bell to ring at the track and the fact that he was not familiar with this crossing.

Now, regarding the crossing, the court does not see how reasonable minds could differ on the proposition where it was plainly apparent as he approached the crossing that the road along which he was riding crossed the railroad track at practically right angles and the railroad apparently ran into a bank; that coming down to the road that he could say that he was ignorant of the fact that the track behind that bank would be obscured from his vision when he could glance ahead 1500 feet as he got near the track and be able to see a part of the rails, and then jump at the conclusion that he saw them all, the court does not feel justified that that question should be submitted to the jury, whether a man exercising ordinary care is justified in jumping at such a conclusion.

Regarding the bells ringing on the signal post: Because they were not ringing, as some of the witnesses said, whether he was justified in relying on the defendant in having established such a system of bells. I am unable to see how a warning of that kind differs in any way essentially from the signals that are ordinarily sounded on the cars themselves —the whistle and the bell on the car—it is a warning that the defendant fixes up there to more effectually warn people. There may be cases where gates are established in a city and a man drives up to the railroad crossing and the gate is raised and he sees it raised before his eyes; that may be such an invitation to him to cross the track as to relieve him from the responsibility himself of looking. It is not necessary to decide that in this case, and so it may be where there is a watchman out on a railroad track and a man drives up and he beckons to him to go across—nothing is said—and the party under those circumstances may be justified in relying on that invitation, that assurance that it is safe, where he would not be justified in relying upon the fact that the bell was not ringing or the whistle being sounded, and thereby abandon all necessary precautions or steps for his own protection and safety. This appears to be settled by Judge Van de Vanter's decision in the 130th Federal.

Now, regarding the skidding of this car, the court does not see how reasonable minds could differ in concluding that the deceased and the chauffeur approached that railroad crossing in the condition it was, at a dangerous rate of speed. Their own testimony—the plaintiffs' testimony as shown in

rebuttal by an expert that the skidding of the car cannot be calculated at all; that they will skid twice as much one time as another. Then that is a rule that works both ways, and the plaintiffs have not in rebuttal disputed in any way that the wheels burned right into the soil. This is not a case here where there is a greasy pavement or anything of that kind that acted in any extraordinary manner that could not be ordinarily foreseen. There is no justification for the court or jury concluding that anything extraordinary happened; that the man's brake refused to work, or that anything that could not have been ordinarily anticipated in the operation of the car took place. Everybody testifies that the chauffeur made a remarkably quick stop after he started to apply the brake."

MR. HASTINGS: "I suppose the court is holding that the motion of defendant is granted?

THE COURT: Yes.

MR. HASTINGS: We desire an exception.

THE COURT: The exception is allowed.

(Whereupon the court instructed the jury as follows:)

THE COURT: Gentlemen of the jury, the court has decided in this case as a matter of law that the plaintiffs cannot recover, and now at this time in the case after all the evidence is in it is the duty of the court to instruct you to return a verdict for the defendants. The verdict reads as follows: 'We, the jury in the above entitled cause finds for the defendants, being instructed by the court so

to do.' The court appoints Mr. Noyes as foreman.

Mr. Hastings: In order to preserve the record we take an exception to the court's instruction to the jury.

THE COURT: You have your exception.

(The verdict as signed by the foreman of the jury is read by the court and filed in this case.)

THE COURT: Under the court instructions, gentlemen of the jury, you say one and all that this is your verdict? (The jurors answer in the affirmative.)

THE COURT: It will be received and filed of record as the verdict returned in this case.

And now in due time plaintiffs submit the foregoing as their proposed bill of exceptions herein, and pray that the same may be settled and allowed.

Dated this 23rd day of April, A. D., 1914.

H. H. A. HASTINGS, L. B. STEDMAN,

Attorneys for Plaintiffs.

The foregoing bill of exceptions is presented in due time and is true and correct, and same may be settled and filed.

Attorneys for Defendants.

And now on this 4th day of June, 1914, this cause coming on to be heard on the application of

the plaintiffs to have their bill of exceptions settled, signed and filed and made of record in said cause, and the plaintiffs appearing by their attorney, H. H. A. Hastings, of the firm of Hastings & Stedman, and the defendant, the Puget Sound Electric Company, appearing by its attorneys, J. B. Howe and Hugh A. Tait, and it appearing to the court that the foregoing bill of exceptions contains all the facts upon which the said cause was tried before the undersigned presiding judge upon the trial of said cause, and all the evidence and testimony offered or received upon the trial of said cause and all objections made by counsel for the respective parties to the receiving or rejection of said evidence and all the rulings of the court thereon and all exceptions taken at the time thereto, the said bill of exceptions is hereby settled, signed and ordered filed and made of record herein, all of which is accordingly done by the undersigned, the Judge before whom the said cause was tried.

EDWARD E. CUSHMAN,

Judge of the United States District Court of the Western District of Washington, Northern Division.

Service of the within draft of proposed bill of exceptions by delivery of copy thereof to the undersigned is hereby acknowledged this 28th day of April, A. D. 1914.

JAMES B. HOWE, HUGH A. TAIT, Attorneys for Defendants. Indorsed: Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, June 2, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, Her Guardian,

Plaintiffs.

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation.

Defendants.

#### Verdict.

We, the jury in the above entitled cause, find for the Defendants, being instructed by the Court so to do.

R. T. NOYES, Foreman.

Indorsed: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 18, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

#### No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, Her Guardian,

Plaintiffs.

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

## Judgment.

This cause having come on regularly for trial upon the merits on the 11th day of February, 1914, before the Court and a jury of twelve persons duly and regularly sworn and impaneled to try the same; Messrs. H. H. A. Hastings and Livingston B. Stedman appearing as attorneys for the plaintiffs, and Messrs. James B. Howe and Hugh A. Tait appearing as attorneys for the defendants; and oral and documentary evidence having been offered and received in behalf of both the plaintiffs and the defendants; and the evidence having been closed and both parties having rested their respective sides of said cause; and the defendants, by their said attorneys, having at the close of all the evidence moved the Court to instruct the jury to return a verdict against the

plaintiffs and in favor of the defendants, upon the grounds that all the evidence failed to show any negligence on the part of the defendants and affirmatively showed that the plaintiffs' decedent, Edmund M. Rininger, and his servant running and operating the automobile in which said Edmund M. Rininger, deceased, was riding at the time of the accident complained of, were guilty of such contributory negligence as to bar a recovery; and the Court having heard the arguments of respective counsel, and having instructed the jury to return a verdict in favor of the defendants and against the plaintiffs; and the jury, in accordance with such instructions, having thereupon returned such verdict, and having been thereupon discharged from further consideration of the case; and the Court being fully advised in the premises; it is now, upon motion of the said attorneys for the said defendants,

ORDERED, ADJUDGED and DECREED that this action be and the same hereby is dismissed; that the defendant Puget Sound Electric Railway do have and recover of and from the plaintiffs its costs of suit herein, taxed at three hundred fiftynine and 10-100 dollars (\$359.10); and that the defendant Puget Sound Traction, Light & Power Company do have and recover of and from said plaintiffs its costs of suit herein, taxed at twenty dollars (\$20); and that execution issue therefor.

To all of which the said plaintiffs, by their said attorneys, in open court, duly excepted; which exception is hereby allowed.

Done in open court, this 27th day of February, 1914.

#### EDWARD E. CUSHMAN,

Judge.

O. K. as to form but without prejudice to Plaintiff's Motion for New Trial.

H. H. A. HASTINGS.

Indorsed: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER et al.,

Plaintiffs,

V.

PUGET SOUND ELECTRIC RAILWAY COM-PANY, a Corporation, et al.,

Defendants.

## Stipulation Fixing Time to Prepare Bill of Exceptions.

It is hereby stipulated and agreed by and between attorneys for plaintiffs and attorneys for defendants that the plaintiffs shall have to, and including, Wednesday, April 15, 1914, in which to prepare and serve upon defendants the draft of their proposed bill of exceptions, and that defendants shall have thirty days thereafter in which to pre-

pare and serve upon plaintiffs their proposed amendments to said proposed bill of exceptions.

Dated at Seattle, Washington, this 19th day of February, A. D., 1914.

> HASTINGS & STEDMAN, Attorneys for Plaintiffs. JAMES B. HOWE, HUGH A. TAIT.

> > Attorneys for Defendants.

Indorsed: Stipulation Fixing Time to Prepare Bill of Exceptions. Filed in the U.S. District Court, Western Dist. of Washington, Northern Division, Feb. 19, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER, et al.,

Plaintiffs.

V.

PUGET SOUND ELECTRIC RAILWAY COM-PANY, a Corporation, et al.,

Defendants.

Order Fixing Time to Prepare and File Bill of Exceptions.

Upon stipulation of plaintiffs and defendants filed herein, it is hereby ORDERED AND AD-JUDGED that plaintiffs do have to, and including,

Wednesday, April 15, 1914, in which to prepare and serve upon defendants their proposed bill of exceptions in this cause, and that defendants shall have thirty days after the service of such proposed bill of exceptions in which to prepare and serve their proposed amendments thereto.

Dated at Seattle, Washington, this February 19, 1914.

#### EDWARD E. CUSHMAN,

Judge.

O. K. James B. Howe, Hugh A. Tait, Atty. for Defts.

Indorsed: Order Fixing Time to Prepare and Serve Bill of Exceptions. Filed in the U. S. Dist. Court, Western Dist. of Washington, Northern Division, Feb. 19, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER et al.,

Plaintiffs,

V.

PUGET SOUND ELECTRIC RAILWAY, et al.,
Defendants.

Stipulation Extending Time to Prepare Bill of Exceptions.

It is stipulated and agreed by and between

attorneys for plaintiffs and attorneys for defendants that plaintiffs shall have an extension of time until and including May 1, 1914, in which to prepare and serve upon defendants the draft of their proposed bill of exceptions, and that defendants shall have thirty days thereafter in which to prepare and serve upon plaintiffs their proposed amendments to said bill of exceptions.

It is further stipulated and agreed by said parties that all maps, pictures, and photographs introduced in evidence in this cause, and which have been marked as exhibits, being plaintiffs' exhibits 1 to 14, inclusive, and defendants' exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, and N—the same forming a part of the evidence on the trial of the above entitled cause—copies of which cannot be conveniently copied into the bill of exceptions, shall be incorporated by reference thereto as part of the bill of exceptions in the above entitled action, and that wherever said maps, photographs, pictures and exhibits are referred to in said bill of exceptions the original thereof, as introduced and marked in evidence, shall be considered as incorporated into, and as forming a part of, the bill of exceptions, and in the event that this cause is taken to the United States Circuit Court of Appeals for the Ninth Circuit for review, either upon appeal or writ of error, an application shall be made to the presiding judge of the District Court of the United States for the Western District of Washington Northern Division for an order permitting the transferring of such original maps, photographs, pictures and exhibits to the said United States Circuit Court of Appeals on such terms as to said judge shall seem proper, and upon the final disposition of this cause in said Circuit Court of Appeals such further order may be made with reference to said exhibits as may seem proper to said court.

Dated this 13th day of April, A. D. 1914.

HASTINGS & STEDMAN,

Attorneys for Plaintiffs.

JAMES B. HOWE,

HUGH A. TAIT,

Attorneys for Defendants.

Indorsed: Stipulation Extending Time to Prepare Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 15, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER et al.,

Plaintiffs,

V.

PUGET SOUND ELECTRIC RAILWAY et al.,
Defendants.

Order Extending Time to Prepare Bill of Exceptions.

Upon stipulation of the plaintiffs and defend-

ant filed herein, it is hereby ordered and adjudged that the time for preparing and filing proposed bill of exceptions is hereby extended to, and plaintiffs do hereby have to and including Friday, May 1, 1914, in which to prepare and serve upon defendants their proposed bill of exceptions in this cause, and defendant shall have thirty days after the service of said proposed bill of exceptions in which to prepare and serve its proposed amendments thereto.

It is further ordered by the court that the maps, photographs and pictures received in evidence during the trial of this cause as exhibits, being plaintiffs' exhibits 1 to 14, inclusive, and defendants' exhibits A, B, C, D, E, F, G, H, I, J, K, L, M and N, may be appropriately referred to in said proposed bill of exceptions it being inconvenient to set out copies thereof and in the event this cause is taken to the Circuit Court of Appeals on writ of error or otherwise, the clerk of this court is directed to forward the aforesaid original exhibits to the clerk of said Circuit Court of Appeals as a part of the record in this cause.

Dated at Seattle, Washington, this 14th day of April, A. D., 1914.

## EDWARD E. CUSHMAN,

Judge.

Approved: James B. Howe, Hugh A. Tait, Attys. for Defts.

Indorsed: Order extending Time to Prepare Bill of Exceptions. Filed in the U.S. District Court, Western Dist. of Washington, Northern Division, Apr. 15, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, Her Guardian,

Plaintiffs.

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

## Certificate of Clerk U. S. District Court to Exhibits.

United States of America, Western District of Washington. ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, Northern Division, do hereby certify that the hereto attached sealed package contains Plaintiffs' Exhibits 1 to 14, inclusive, and Defendants' Exhibits A to N, inclusive, introduced and used upon the trial of the foregoing cause, and that the said Exhibits are transmitted to the Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered, together with the record on appeal certified of even date herewith;

that the said Exhibits are so certified and transmitted pursuant to the order of the District Court made and entered in said cause April 15, 1914, a copy of which order is attached to any made a part of this certificate and a copy of which said order will also be found on Page 260 of said record on appeal.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 21st day of July, 1914.

(Seal)

FRANK L. CROSBY, Clerk.

By ED M. LAKIN, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, Her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELECTRC RAILWAY COM-PANY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendants.

## Petition for Writ of Error.

And now come Nellie M. Rininger and Helen Dorothy Rininger, a miner, by A. S. Kerry, her guardian, plaintiffs herein, and say:

That on or about the 27th day of February, A. D., 1914, this court entered a judgment herein in favor of the defendant, Puget Sound Electric Railway Company, a corporation, and against these plaintiffs in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of these plaintiffs, and of which more in detail appears from the assignments of errors which is filed with this petition.

WHEREFORE, these plaintiffs pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals, Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals.

H. H. A. HASTINGS, L. B. STEDMAN, Attorneys for Plaintiffs.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 18, 1914, 2:30 p. m. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELLECTRIC RAILWAY COM-PANY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendants.

## Assignment of Errors.

Now come plaintiffs, Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, in the above entitled cause, and assign errors in the trial and decision of said Circuit Court in said cause as follows:

1.

Said court erred in granting the motion made by counsel for defendant, Puget Sound Electric Company, upon the conclusion of the testimony introduced upon the trial of this cause, that the jury be instructed to return a verdict in favor of said defendant, Puget Sound Electric Railway Company, a corporation, and against these plaintiffs.

2.

Said court erred in not submitting for determining the issues between the parties to said jury.

3.

Said court erred in ruling that, as a matter of law, the deceased, Dr. Edmund M. Rininger, and Kent Brodnix, the chauffeur driving the automobile in which deceased was riding when he was killed, were guilty of contributory negligence in not stopping the automobile and looking and listening to ascertain if a car were approaching the highway crossing at Riverton before they attempted to drive across defendants' railway tracks at that point.

4.

The court erred in ruling that, as a matter of law, the evidence showed that said Dr. Edmund M. Rininger and Kent Brodnix, his chauffeur, who was driving the automobile in which they were riding, approached the tracks of the defendant, Puget Sound Electric Railway Company, a corporation, at Riverton, and attempted to cross such tracks at an unreasonable rate of speed.

5.

The court erred in ruling that all reasonable minds could not differ in concluding that Dr. Edmund M. Rininger and his chauffeur, Kent Brodnix, approached and attempted to cross the railroad tracks of the Puget Sound Electric Railway Company over the highway at Riverton at a dangerous rate of speed, and holding that the court was not justified in submitting to the jury the question whether or not said Dr. Edmund M. Rininger and his chauffeur, Kent Brodnix, were exercising ordi-

nary care in attempting to drive across said crossing at said time.

6.

The court erred in ruling that all reasonable minds could not differ in concluding that deceased, Dr. Edmund M. Rininger, and his chauffeur, Kent Brodnix, approached the railway crossing of the defendant, Puget Sound Electric Railway Company, at Riverton, in the condition that it was then in, at a dangerous rate of speed.

7.

The court erred at the close of the testimony in directing the jury to return a verdict in this cause in favor of the defendant, Puget Sound Electric Railway Company, and against plaintiffs in this action.

8.

The court erred in entering a judgment in this cause in favor of Puget Sound Electric Railway Company, a corporation, and against these plaintiffs.

9.

The court erred in not sustaining the objection of the plaintiffs to the following question propounded to plaintiff, Nellie M. Rininger, to-wit: "I wish you would state what the estate amounted to which you and his daughter received." Which objection was made on the ground that it was irrelevant, immaterial and incompetent, and overruled by the court, and exception allowed. (See Bill of Ex., pg. 137.) The substance of the answer being that the plain-

tiffs received Sixty Thousand Dollars in notes from the sale of some property and that Nellie M. Rininger had received in addition Five Thousand Four Hundred and Thirty-seven Dollars (\$5437.00), besides the book accounts still on the books of the deceased, amounting to something like \$30,000.

#### 10.

The court erred in refusing the following question to be answered by the witness, Kent Brodnix: "You may state, if you know, what would be a reasonable rate of speed to approach a crossing similar to this, with an automobile of the weight of this automobile, with the number of passengers in it that you had at that time." This was objected to and objection sustained. It was expected to prove by the witness that he was not approaching this crossing at that time at an unreasonable rate of speed. (See Bill of Ex., pg. 20.)

#### 12.

The court erred in refusing the following question to be answered by the witness Albro Gardner, Jr.: "Mr. Gardner, from your experience and knowledge as a civil engineer, you may state whether or not this is a dangerous crossing." There was an objection to this question, which was sustained and exception noted. It was expected to prove by this witness that from his knowledge as a civil engineer, the physical conditions surrounding this crossing made it dangerous from an engineering standpoint. (See Bill of Ex., pg. 15.)

13.

That the court erred in refusing the following question to be answered by the witness H. D. Hanford: "Do you know whether or not, Mr. Hanford, from your knowledge as an engineer and also the experience that you had in laying out this track, whether or not the crossing there could have been constructed so as to have eliminated, or at least greatly reduced, the danger of this highway crossing?" to which question there was an objection by defendant, which was sustained and exception noted. It was expected to be proven by the answer to this question that the witness who had testified that he was the engineer in charge of the laying out and construction of the tracks of the Puget Sound Electric Railway Company at this point, would testify that there was another and reasonable method of laying out and constructing said tracks at said point, at a reasonable expense, that would have greatly reduced, if not eliminated, the dangerous character of this crossing, and that same was discussed by him with the executive officers of the company so constructing said tracks. (See Bill of Ex., pg. 56.)

14.

The court erred in not sustaining the objection of the plaintiffs to the following question propounded to the witness Anna M. Gookstetter: "And now, Miss Gookstetter, you have stated that in 1910 you actually collected something over \$36,000. What were the expenses for that year in connection with

the Doctor's business?" The objection was based on the ground that the question was immaterial, and was overruled, and an exception allowed, and the answer thereto was: "The expenses from January 1, 1910, to January 1, 1911, were \$13,536.71." (See Bill of Ex., 53.)

WHEREFORE, plaintiffs pray that the judgment may be reversed and a new trial granted.

H. H. A. HASTINGS, L. B. STEDMAN, Attorneys for Plaintiffs.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, June 18, 1914, 1:30 p. m. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY COM-PANY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendants.

### Order Allowing Writ of Error.

This 18th day of June, 1914, come plaintiffs by their attorneys, and file herein and present to the court their petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judician Circuit, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof the court does allow the writ of error upon plaintiffs giving a bond according to law in the sum of One Thousand Dollars (\$1000.-00), which will operate as a supersedeas bond and a bond for costs.

### EDWARD E. CUSHMAN.

Judge.

Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 18, 1914, 2:30 p. m. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY COM-PANY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendants.

### Bond.

KNOW ALL MEN BY THESE PRESENTS, That we, Nellie M. Rininger, as principal, and the American Surety Company of New York, a corporation, as surety, for any on behalf of said Nellie M. Rininger, and said American Surety Company of New York, both as surety and as an undertaking for and on behalf of Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, and on behalf of A. S. Kerry, as guardian for said Helen Dorothy Rininger, a minor, are held and firmly bound unto the Puget Sound Electric Railway Company, a corporation, in the full sum of One Thousand Dollars, to be paid to said Puget Sound Electric Railway Company, a corporation, its attorneys, successors or assigns, to which payment well

and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of June, A. D. 1914.

WHEREAS, lately at the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court between Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, as plaintiffs, and Puget Sound Electric Railway Company, a corporation, as defendant, a judgment was rendered against said plaintiffs, Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, and in favor of said Puget Sound Electric Railway Company, a corporation, and said Nellie M. Rininger and said Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said Puget Sound Electric Railway Company citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California;

Now, the condition of the above obligation is such that if said plaintiffs, Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, shall prosecute said writ of error to effect, and answer all damages and costs if they

shall fail to make their plea good, then the above obligation to be void, but else to remain in full force and effect.

### NELLIE M. RININGER (Seal).

American Surety Company of New York. By Edward J. Lyons, Resident Vice President. (Seal) S. H. Melrose, Resident Assistant Secreteary.

Acknowledged before me the day and year first above written.

(Seal)

### H. H. A. HASTINGS,

Notary Public in and for the State or of Washington, residing at Seattle.

Approved by me:

### EDWARD E. CUSHMAN,

Judge.

Indorsed: Plaintiffs' Bond. Filed in the U. S. District Court, Western Dist. of Washington, June 18, 1914, 2:30 p. m. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

### Writ of Error.

United States of America, Ninth Judicial Circuit. ss.

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said Circuit Court before you, or some of you, between Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, plaintiffs in error, and Puget Sound Electric Railway Company, a corporation, defendant in error, a manifest error hath happened to the great damage of said Nellie M. Rininger and said Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, State of California, in said circuit, within thirty days from the date hereof, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable E. D. White, Chief Justice of the United States, this 18th day of June, A. D. 1914.

Attest:

FRANK L. CROSBY,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Ву ———

Deputy.

Allowed by

(Seal) EDWARD E. CUSHMAN,

Judge.

Indorsed: Original. No. 2568. In the District Court of the United States for the Western District of Washington, Northern Division. Nellie M. Rininger, et al., vs. Puget Sound Electric Railway Company. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 18, 1914, 2:30 p. m. Frank L. Crosby, Clerk. By E. M. L., Deputy.

### Citation.

United States of America. ss.

The President of the United States, to the Puget Sound Electric Railway Company, a corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Western District of Washington, Northern Division, wherein Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, are plaintiffs in error, and you are defendant in error, to show cause if any there by why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. D. White, Chief Justice of the United States, this 18th day of June, A. D. 1914.

### EDWARD E. CUSHMAN, United States District Judge.

Indorsed: Original. No. 2568. In the District Court of the United States for the Western District of Washington, Northern Division. Nellie M. Rininger, et al., v. Puget Sound Electric Railway Co. Citation. Filed in the U. S. District Court, Western Dist. of Washington, June 18, 1914, 2:30 p. m. Frank L. Crosby, Clerk. By E. M. L., Deputy. Hastings & Stedman, Attorneys for Plaintiffs. No. 60-65 Haller Building, Seattle, Washington. At which place service of all subsequent papers except writs and process may be made.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY COM-PANY,

Defendant.

### Acceptance of Service.

We, the undersigned, attorneys for defendant, Puget Sound Electric Railway Company, a corporation, do hereby admit service and receipt of a copy of the petition for writ of error, assignment of errors, order allowing petition for writ of error, bond on writ of error, writ of error, and citation on writ of error, and do hereby waive any other or further service of said matters.

Seattle, Washington, June 19, 1914.

JAMES B. HOWE, HUGH A. TAIT,

Attorneys for Puget Sound Electric Railway Company.

Indorsed: Acceptance of Service of Petition for Writ of Error, Assignment of Errors, Order Allowing Petition for Writ of Error, Bond on Writ of Error, Writ of Error and Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 23, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER, et al.,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY, et al.,
Defendants.

### Order Extending Time to File Transcript.

Now on this 26th day of June, 1914, upon motion of attorney for plaintiffs in error, and for sufficient cause appearing, it is ordered that the time within which the clerk of this court may prepare, certify and transmit to the United Statees Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby, extended to and including 31st day of July, 1914.

EDWARD E. CUSHMAN,

District Judge.

Indorsed: Order Extending Time to File Transcript. Filed in the U. S. District Court, Western Dist. of Washington, June 26, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY COM-PANY, a Corporation,

Defendants.

### Stipulation Relating to the Contents of Printed Record.

It is hereby stipulated by and between counsel for plaintiff and plaintiff in error and counsel for defendant in error that there shall be embraced in the printed records the following matters:

Amended complaint;

Separate answer of the Puget Sound Electric Railway Co.;

Reply of plaintiffs thereto;

Empaneling of the jury;

Bill of exceptions;

Verdict;

Judgment of the court;

First stipulation extending time for filing and settling proposed bill of exceptions;

Order extending time for filing bill of exceptions;

Second stipulation extending time for filing bill of exceptions;

Second order extending time for filing bill of exceptions and directing clerk to transmit original exhibits to the Circuit Court of Appeals;

Petition for writ of error;

Assignment of error;

Allowance of writ of error;

Bond and approval;

Writ of error;

Citation in error;

Acceptance of service of Writ of Error, Citation, Assignment of Errors, Petition for Writ of Error; Order Allowing Writ of Error.

Order allowing Writ of Error.

This stipulation;

Clerk's certificate.

Dated at Seattle, Washington, this June 15th, 1914.

H. H. A. HASTINGS and L. B. STEDMAN,

Attorneys for Plaintiffs.
J. B. HOWE,
HUGH A. TAIT,

Attorneys for Defendant.

Indorsed: Stipulation Relating to the Contents of the Printed Record. Filed in the U. S. District Court, Western Dist. of Washington, June 23, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation,

Defendants.

# Certificate of Clerk U. S. District Court to Transcript of Record, Etc.

United States of America, Western District of Washington.—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing printed pages, numbered from 1 to 287, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court and that the same constitute the record on return to said Writ of Error herein from the judgment of said

United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiffs in Error for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S., as
Amended by Sec. 6, Act of March 2,
1905) for making record, certificate or
return—710 folios at 30c\$213.00
Certificate of Clerk to transcript of record—
3 folios at 30c
Seal to said Certificate
Certificate of Clerk to Original Exhibits—
3 folios at 30c
Seal to said Certificate
Statement of cost of printing said transcript
of record, collected and paid 175.00
\$390.60

I hereby certify that the above cost for preparing, certifying and printing said record amounting to \$390.60, has been paid me by Messrs. Hastings & Stedman, Attorneys for Plaintiffs in Error.

I further certify that I hereby attach and herewith transmit the original Writ of Error and orig-

inal Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 21st day of July, 1914.

(SEAL)

FRANK L. CROSBY,

Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

### "ORIGINAL."

### Writ of Error.

United States of America, Ninth Judicial Circuit.—ss.

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said Circuit Court before you, or some of you, between Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, Plaintiffs in Error, and Puget Sound Electric Railway Company, a corporation, Defendant in Error, a manifest error hath happened to the great damage of said Nellie M. Rininger and said Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, Palintiffs in Error, as by their complaint appears, we, being willing that error, if any hath been, should

be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the City of San Francisco, State of California, in said Circuit, within thirty days from the date hereof, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable E. D. White, Chief Justice of the United States, this 18th day of June, A. D. 1914.

Attest: FRANK L. CROSBY, Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Deput.

Allowed By:

(SEAL) EDWARD E. CUSHMAN,

Judge.

Indorsed: (Original) No. 2568. In the Dis-

trict Court of the United States for the Western District of Washington, Northern Division. Nellie M. Rininger, et al., vs. Puget Sound Electric Railway Company, Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 18, 1914, 2:30 p. m. Frank L. Crosby, Clerk. By E. M. L., Deputy. Hastings & Stedman, Attorneys for Plaintiffs. No. 60-65 Haller Building, Seattle, Washington. At which place service of all subsequent papers except writs and process may be made.

### "ORIGINAL."

#### Citation.

United States of America.—ss.

The President of the United States, to the Puget Sound Electric Railway Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the Clerk's office of the United States District Court for the Western District of Washington, Northern Division, wherein Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, are Plaintiffs in Error, and you are Defendant in Error, to show cause if any there be why the judgment rendered against the said Plaintiffs in Error, as in the said Writ of Error mentioned, should not be cor-

rected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. D. White, Chief Justice of the United States, this 18th day of June, A. D. 1914.

### EDWARD E. CUSHMAN, United States District Judge.

Indorsed: (Original) No. 2568. In the District Court of the United States for the Western District of Washington, Northern Division. Nellie M. Rininger, et al., v. Puget Sound Electric Railway Co. Citation. Filed in the U. S. District Court, Western Dist. of Washington, June 18, 1914. 2:30 p. m. Frank L. Crosby, Clerk. By E. M. L., Deputy. Hastings & Stedman, Attorneys for Plaintiffs. No. 60-65 Haller Building, Seattle, Washington. At which place service of all subsequent papers except writs and process may be made.



### United States

# Circuit Court of Appeals

## For the Ninth Circuit

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

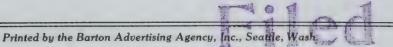
Plaintiffs in Error.

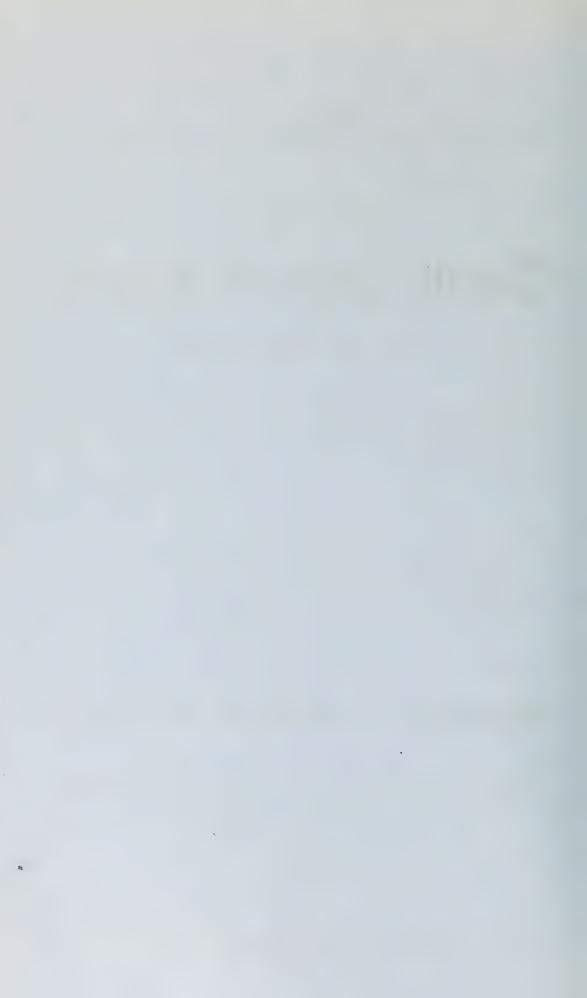
VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants in Error.

# Transcript of Supplemental Record

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.





### United States

# Circuit Court of Appeals

## For the Ninth Circuit

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

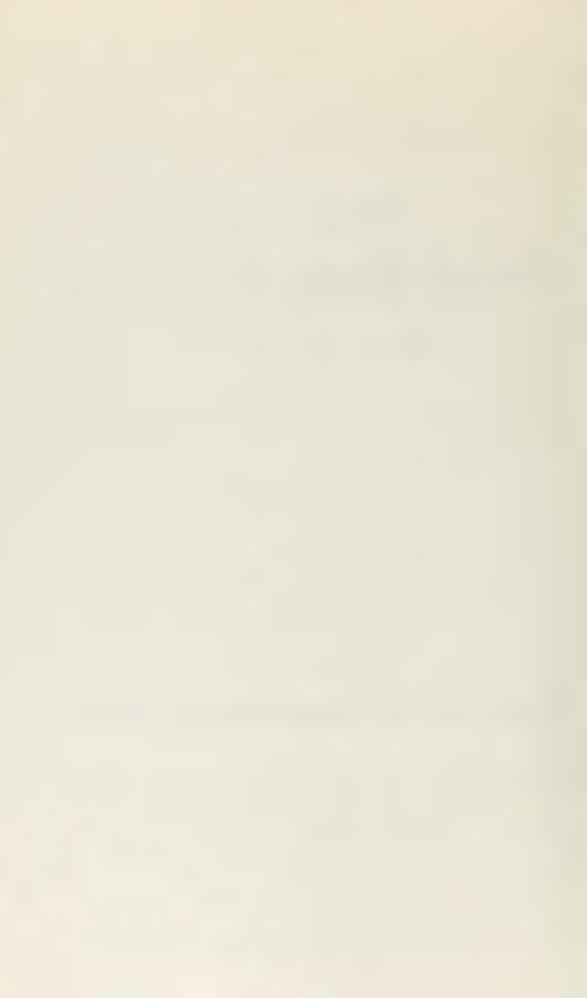
Plaintiffs in Error.

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants in Error.

# Transcript of Supplemental Record

Upon Writ of Error to the United States District Court for the Western District of Wasnington, Northern Division.



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Praecipe	13
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In the District Court of the United States for the Western District of Washington. Northern Division.

### No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

Plaintiffs in Error,

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants in Error.

### Names and Addresses of Counsel.

H. H. A. HASTINGS, ESQ., Attorney for Plaintiffs in Error, 64 Haller Block, Seattle, Washington.

L. B. STEDMAN, Attorney for Plaintiffs in Error, 64 Haller Block, Seattle, Washington.

JAMES B. HOWE, ESQ., Attorney for Defendants in Error, 235 Pioneer Building, Seattle, Washington.

HUGH A. TAIT, ESQ., Atorney for Defendants in Error, 235 Pioneer Building, Seattle. Washington.

In the Superior Court of the State of Washington, for King County.

No. 95920.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

Plaintiffs,

 $\nabla$ .

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

### Petition for Removal.

To the Honorable the Superior Court of the State of Washington, for King County:

The petition of defendants Puget Sound Electric Railway and Puget Sound Traction, Light & Power Company respectfully shows:

I.

Your petitioner Puget Sound Electric Railway at the time of the commencement of the above entitled suit was, ever since has been, and now is, a corporation created and existing under the laws of the State of New Jersey, and at all of said times was and now is a citizen of said State of New Jersey and at all of said times was and now is a resident of said State of New Jersey and a non-resident of the State of Washington.

II.

Your petitioner Puget Sound Traction, Light

& Power Company, at the time of the commencement of the above entitled suit was, ever since has been, and now is, a corporation created and existing under the laws of the State of Masachusetts, and at all of said times was and now is a citizen of said State of Massachusetts, and at all of said times was and now is a resident of said State of Massachusetts, and at all of said times was and now is a resident of said State of Massachusetts, and at all of said times was and now is a resident of said State of Massachusetts and a non-resident of the State of Washington.

#### III.

The above named plaintiffs Nellie M. Rininger and Helen Dorothy Rininger, a minor, and her guardian, A. S. Kerry, at the time of the commencement of the above entitled suit, were, ever since have been and each now is a citizen of the United States and a citizen and resident of the State of Washington and of the northern division of the western district of Washington.

### IV.

The above entitled suit and the entire controversy therein is between your petitioners as defendants and the above named Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, as plaintiffs. The above entitled suit is a suit at common law, of a civil nature, wherein the matter in controversy at the time of the commencement of the above entitled suit exceeded and now exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3000), and is a suit between citizens of different states.

V.

Your petitioners offer herewith a bond, with good and sufficient surety, for their entering in the District Court of the United States, for the Western District of Washington, Northern Division, within thirty (30) days from the date of filing said petition, a certified copy of the record in this suit, and for paying all costs that may be awarded by the said District Court, if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioners pray this court to proceed no further herein, except to make an order of removal and to accept the said surety and bond, and to cause this suit and the record herein to be removed into the District Court of the United States, for the Western District of Washington, Northern Division. And your petitioners will ever pray, etc.

JAMES B. HOWE, HUGH A. TAIT, Attorneys for Petitioners.

State of Washington, County of King. ss.

Jacob Furth, being first duly sworn, on oath deposes and says: I have read the foregoing petition, know the contents thereof, and believe the same to be true. I make this affidavit and verification in behalf of the petitioners Puget Sound Electric Railway and Puget Sound Traction, Light & Power Company, because said petitioners are and

each of them is a corporation, and I am the President of each of said petitioners.

(Seal) JACOB FURTH.

Subscribed and sworn to before me this 26th day of August, 1913.

O. B. AYRES,

Notary Public in and for the State of Washington, residing at Seattle.

Filed in Clerk's office Aug. 26, 1913.

W. K. SICKELS, Clerk.

By G. A. GRANT, Deputy.

Indorsed: Filed in U. S. District Court, Western Dist. of Washington, Sept. 23, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

Plaintiffs,

v.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

### Order of Removal.

The petition of the defendants in the above

entitled cause, Puget Sound Electric Railway, a corporation, and Puget Sound Traction, Light & Power Company, a corporation, for the removal of the above entitled cause to the District Court of the United States, for the Western District of Washington, Northern Division, having been duly presented in open court, and the bond of the defendants, with good and sufficient surety thereon, being tendered with said petition, and it appearing that the cause is one which is proper to be removed to the District Court of the United States, it is ordered and adjudged that the above entitled cause be and the same is hereby transferred to the District Court of the United States, for the Western District of Washington, Northern Division, and that no further proceedings be had herein, except to transmit a certified copy of the record to said court.

Done in open court this 28th day of August, 1913.

### A. W. FRATER, Judge.

Filed in Clerk's office Aug. 28, 1913. W. K. Sickels, Clerk. By G. A. Grant, Deputy.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sep. 23, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the Superior Court of the State of Washington, for King County.

No. 95920.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

Plaintiffs,

V.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

### Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS, That defendant Puget Sound Electric Railway, a corporation created and existing under the laws of the State of New Jersey, and defendant Puget Sound Traction, Light & Power Company, a corporation created and existing under the laws of the State of Massachusetts, as principals, and Jacob Furth, as surety, are held and firmly bound unto Nellie M. Rininger, Helen Dorothy Rininger, a minor, and A. S. Kerry, her guardian, the above named plaintiffs, their and each of their heirs, executors, administrators, successors and assigns, in the penal sum of five hundred dolars (\$500), for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 26th day of August, A. D. 1913.

The condition of the above obligation is such that

WHEREAS, The above named plaintiffs instituted the above entitled suit in the Superior Court of the State of Washington for King County against the above named defendants; and

WHEREAS, The above named defendants have petitioned for the removal of the above entitled suit from said court to the District Court of the United States for the Western District of Washington, Northern Division,

NOW, THEREFORE, If the said Puget Sound Electric Railway and Puget Sound Traction, Light & Power Company shall enter in said District Court of the United States, within thirty (30) days from the date of filing of said petition, a certified copy of the record in the above entitled suit, and shall well and truly pay all costs that may be warded by said District Court of the United States, if said District Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

WITNESS our hands and seals, the day and year first above written.

PUGET SOUND ELECTRIC RAILWAY,
(Seal)

By JACOB FURTH,

Its President.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY,

(Seal)

By JACOB FURTH,

Its President.

JACOB FURTH.

State of Washington, County of King. ss.

JACOB FURTH, being first duly sworn, on oath says that he is a resident of the State of Washington and County of King; that he is not a counsellor or attorney at law, sheriff, clerk of the Superior Court, or other officer of such court; that he is worth the sum of five hundred dollars (\$500), in property situated within said King County, Washington, over and above all debts, and exclusive of property exempt from execution.

JACOB FURTH.

Subscribed and sworn to before me this 26th day of August, 1913.

(Seal)

O. B. AYRES,

Notary Public in and for the State of Washington, residing at Seattle.

On this 28th day of August, 1913, the Petition for Removal in the above entitled cause was presented to the undersigned judge of the above named court, in open court, and at the same time the foregoing bond was presented; and the foregoing bond and the surety thereon are, by the undersigned, taken and approved the day aforesaid.

A. W. FRATER,

Judge.

Filed in Clerk's Office Aug. 26, 1913. W. K. Sickels, Clerk. G. A. Grant, Deputy.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Sept. 23, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division, and

In the United States Circuit Court of Appeals, Ninth Circuit.

### No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

Plaintiffs,

#### VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

### Stipulation.

It is hereby stipulated by and between counsel for plaintiffs in error and counsel for defendant in error that the exhibits in this cause, being plaintiffs' in error exhibits 1 to 14, inclusive, and defendants' in error exhibits A, B, C, D, E, F, G, H, I, J, K, L, M and N, shall be transmitted to and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, and that

none of said exhibits shall be copied into the printed record or printed or reproduced but that the originals shall be considered and treated as a part of the record in this cause upon the hearing upon the merits of said appeal.

HASTINGS & STEDMAN,
Attorneys for Plaintiffs in Error.
JAMES B. HOWE,
HUGH A. TAIT,

Attorneys for Defendant in Error.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 22, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

### Order.

It appearing that it is impracticable to reproduce or print the exhibits received in evidence upon

the trial of this cause, and that they should be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to be used upon the consideration of the appeal in this cause, and it further appears that the parties hereto have stipulated that same shall be so transmitted, and shall not be printed or reproduced, but that the originals shall be considered upon the hearing of the appeal in this cause;

It is therefore ordered that the exhibits introduced in evidence by plaintiffs in error, to-wit, plaintiffs' exhibits 1 to 14, inclusive, and defendant's in error exhibits A, B, C, D, E, F, G, H, I, J, K, L, M and N, shall be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that same shall not be printed or reproduced, but that the originals shall be considered as a part of the record in this cause, and considered by the said United States Circuit Court of Appeals in determining this appeal.

Done in open court this 22nd day of July, A. D. 1914.

### EDWARD A. CUSHMAN.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 22, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

### Praecipe.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare and certify Supplemental printed record in above case consisting of Petition for Removal, Order of Removal, Bond on Removal, including this Praecipe, and your Certificate. Also Stipulation waiving printing of Exhibits and Order on same.

HASTINGS & STEDMAN, Attorneys for Plaintiff in Error.

Indorsed: Praecipe for Process, etc. Filed in the U. S. District Court, Western District of Washington, Northern Division, July 23, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. In the District Court of the United State for the Western District of Washington. Northern Division.

No. 2568.

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. KERRY, her Guardian,

Plaintiffs,

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation, Defendants.

## Certificate of Clerk U. S. District Court to Transcript of Supplemental Record, Etc.

WESTERN DISTRICT OF WASHINGTON, UNITED STATES OF AMERICA, ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 16 printed pages, numbered from 1 to 16, inclusive, to be a full, true, correct and complete copy of so much of the record and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, as is stipulated for by counsel of record herein in Supplemental Praecipe, as the same remain of record and on file in the office of the

Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid into my office by or on behalf of the Plaintiffs in Error for the preparation and certification of the Supplemental Record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended	
by Sec. 6, Act of March 2, 1905) for	
making record, certificate or return, 14	
folios at 30c\$	4.20
Certificate of Clerk to transcript of rec-	
ord, 3 folios at 30c	.90
Seal to said Certificate	.40
Statement of cost of printing Supple-	
mental Transcript of record, collected	
and paid	20.00
_	

\$25.50

I hereby certify that the above cost for preparing and certifying Supplemental Record, amounting to \$25.50, has been paid to me by Messrs. Hastings & Stedman, Attorneys for Plaintiffs in Error.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 25th day of July, 1914.

FRANK L. CROSBY, Clerk.

### United States

# Circuit Court of Appeals

### For the Ninth Circuit

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, Her Guardian,

Plaintiffs in Error.

VS.

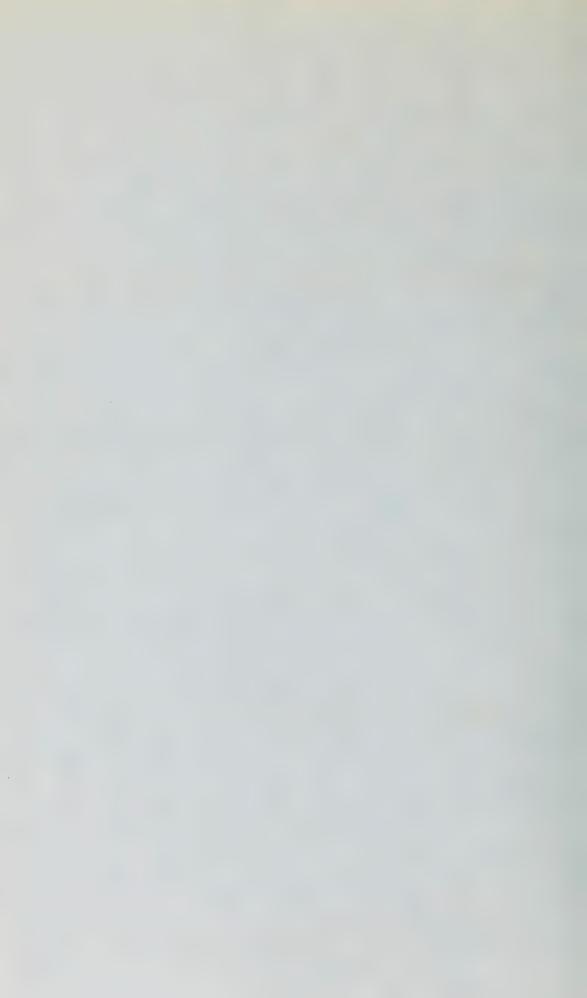
PUGET SOUND ELECTRIC RAILWAY COM-PANY, a Corporataion,

Defendant in Error.

## Brief of Plaintiffs in Error

H. H. A. HASTINGS, L. B. STEDMAN, Attorneys for Plaintiff in Error.

Seattle, Wash.



### United States

# Circuit Court of Appeals

### For the Ninth Circuit

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, Her Guardian,

Plaintiffs in Error,

VS.

PUGET SOUND ELECTRIC RAILWAY COM-PANY, a Corporataion,

Defendant in Error.

## Brief of Plaintiffs in Error

H. H. A. HASTINGS, L. B. STEDMAN, Attorneys for Plaintiff in Error.

Seattle, Wash.



NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, Her Guardian,

Plaintiffs in Error,

VS.

PUGET SOUND ELECTRIC RAILWAY COM-PANY, a Corporataion,

Defendant in Error.

#### STATEMENT OF THE CASE.

This action was instituted in the Superior Court of King County, Washington, by Nellie M. Rininger, the surviving widow, and Helen Dorothy Rininger, a minor and the only child of Dr. E. M. Rininger, deceased, (the last plaintiff appearing by her legal guardian, A. S. Kerry), against the Puget Sound Electric Railway Company, a corporation created under the laws of the State of New Jersey and therefore a citizen and resident of that state, and the Puget Sound Traction, Light & Power Company, a corporation created under the laws of the State of Massachusetts and therefore a citizen and resident of that state, seeking to recover compensatory damages on account of the death of said Dr. E. M. Rininger caused by the negligent acts and conduct of said defendants. In due time defendant properly removed said cause to the Federal Court (Sup. Rec. 9), and thereafter the plaintiffs in error were permitted to file an amended complaint (Rec. 2) in which it is alleged that the defendants in error own and operate an electric interurban railway running between Seattle and Tacoma, in Washington, and that Dr. E. M. Rininger lost his life while attempting to cross the tracks of the defendants in an automobile at a public thoroughfare crossing at Riverton in Washington, and further alleging that said railroad tracks were negligently and carelessly constructed and maintained, and that the interurban car which struck the automobile of the deceased was negligently operated by the defendants in this, it was run at an excessive rate of speed for that locality and that no warnings were given by the train crew or otherwise of the approach of the electric car and that the deceased was free from fault or negligence; that he was 42 years of age and was an exceptionally skilled surgeon and physician with a large and lucrative practice in the Pacific Northwest, and was earning in his practice an annual income of \$60,000 to \$75,-000; and asking for judgment for \$300,000. Each of the defendants answered separately, denied all acts of negligence and further alleged contributory negligence and carelessness on the part of the deceased and his chauffeur, who was driving the automobile. A reply denied any fault or carelessness on the part of the deceased or his chauffeur. The cause was tried before a jury, where as usual there was much conflict in the testimony with an attempt on the part of defendant in error to discredit the testimony of eye witnesses by some absurd hypothetical expert evidence, but we believe that a fair

statement of the pleadings and evidence disclosed the following facts and conditions.

Seattle is a city which in 1912 had a population of 240,000 people. About 32 miles south of which is the city of Tacoma. There is only one main street or highway leading south from Seattle (Rec. 24-77-160), and it passes through the suburbs of the last city and through White River Valley and the several towns therein to Tacoma (Rec. 24-38). The defendant in error, Puget Sound Electric Railway Company owns and operates an electric interurban line between the two cities above mentioned, and at a point approximately two miles from the south limits of Seattle, its roadbed crosses the Duwamish River, passes a point called Quarry and at a distance of 1500 feet therefrom it passes another point called Allentown, and farther along and at a distance of approximately 1200 feet it passes Riverton, and then passes toward the City of Tacoma. From Seattle over the route above described, and for some distance south of Riverton the roadbed is double tracked, and at Riverton these tracks cross this main street or thoroughfare (Exhibit 10). At a distance of about 300 feet southwesterly from this crossing, the highway, which is macadamized, runs northerly toward Seattle and descends toward the crossing at about a 4 per cent grade (Rec. 25, Exhibit 1) and when it reaches within 15 or 20 feet of the track, it runs on a level across the tracks, where it turns abruptly north and parallels the tracks until it reaches the Allentown bridge, and there the highway diverges eastward across the Duwamish River. From Quarry to Riverton the tracks are constructed at the foot of and on a curve into a bluff. This bluff which is over 1200 feet long is excavated at its base, thereby forming a steep and nearly perpendicular bank on the west side of the tracks about 44 feet high until it approaches within 120 feet of the highway at Riverton, when it gradually recedes and disappears at the highway. (Exhibit 2.) About 10 feet west of the west rail at Riverton and 17 feet north of the center of the highway, the defendant in error has erected an iron post approximately 12 feet high, upon which is an electric alarm gong about 12 inches in diameter, and on top of this are a series of five red electric lights. There is also on this post a large railroad crossing sign. At a point about 1220 feet north of the crossing and on the west rail is an electric mechanism so constructed that a southbound car cuts in the current and ordinarily sets the gong to ringing and lights the red electric lamps (Record 26). This is for the purpose of warning travelers about to cross these tracks of the approach of a southbound car or train. The gong remains in action until after the car or train has passed the station at Riverton, where at a point 20 feet south is another electric mechanism that cuts out the current from the gong and lights, whereupon the gong ceases to ring and the lights become dark. A similar mechanism is constructed on the east rail but in vice versa position, being

operated similarly by northbound cars. (Rec. 26.)

Under usual conditions this gong when in proper operation could be heard 700 to 800 feet, although one witness testified that in a clear day one could hear it 1200 to 1500 feet. (Rec. 153.) The ground north of the highway and west of the electric tracks formed the bluff above referred to and at a distance of 50 feet north of the highway the bluff is 18.6 feet above the tracks. The curvature of the bank along the west side of the electric right of way from Quarry to Riverton has the effect of deflecting the sounds and warnings of southbound cars toward the east, and in consequence it was and is difficult for one at or near the Riverton crossing to hear the rumble or sounds of a southbound car until it was practically at the crossing. (Rec. 67-80-81-154.) One standing on the Riverton crossing and looking northward could see an approaching car on the tracks all the way between the crossing and Allentown and for some distance north of that point (Exhibit 2), but at various points west of the tracks, but on the highway one could plainly see both tracks at Allentown and unless familiar with the conditions would assume that they would be able to see a car all the way between Allentown and this crossing, but as a matter of fact the car, after leaving Allentown and following the west track around the curve into the bank, wouldentirely disappear from view and would not be seen again until it was within 40 to 50 feet of the crossing. (Rec. 68, Exhibit 7.) The trolley poles fol-

lowing the curve of the tracks increased the difficulty of seeing an approaching car. This condition was conceded by the witnesses for both parties, but there is a variation in the testimony as to how far west of the crossing would one be before this condition would arise. Scott Malone, a deputy sheriff, and a witness for the plaintiff in error, testified that this point was 50 feet west of the track. The fact that this curved bank deflected the sound of a passing car eastward away from the tracks and retarded such sounds from reaching the Riverton crossing and also that a southbound car though plainly visible at Allentown would disappear from view shortly after leaving Allentown to one who was in the highway until within 50 feet of the crossing was not readily discernible to one casually passing by.

At that time there was a large amount of traffic over this crossing, it being the principal thoroughfare leading south from Seattle, which traffic was so heavy that at times it was almost continuous (Record 78-160). There is a small passenger station on the east side and a freight station on the west side of the tracks at this crossing and about 70 feet west of the tracks was a store building and store operated by Mr. Rosenberg (Exhibit 10). There was also near by a meat market, two other grocery stores and a machine shop, and another store across the river; also quite a settlement in the near vicinity. (Rec. 100.)

This highway, for several miles on either side

of this crossing, was macadamized, for a width of 14 or 15 feet except between the crossing and the Allentown bridge, and that portion contiguous to and west of the tracks had been resurfaced a few weeks previous to the accident by having been covered with a coating of hot tar, or asphaltum, and then covered with rock screenings to absorb the tar (Rec. 188). The heat of the sun, at different places, softened this composition, causing the tar to ooze up to the surface, and it was necessary to add additional rock screenings on such soft places from time to time until all of the tar was absorbed (Rec. 149-190).

The Rosenberg store, above mentioned, was on the south side of the highway, and as the ground at that point was several feet lower than the highway, the building stood above the ground with a platform open underneath leading from the building to the street (Exhibit 1).

Dr. Rininger owned a Stearns automobile, which weighed between 4,500 to 5,000 pounds, without passengers (Record 151). Kent Brodnix was his chauffeur, and this chauffeur had driven six or seven times over this crossing prior to the accident (Rec. 51), but had not become familiar with the physical difficulties pertaining to hearing the sound of, or seeing, an approaching southbound car (Rec. 47-48-52-106), and there was no evidence that Dr. Rininger knew these conditions. Shortly after four o'clock in the afternoon of July 25, 1912, Dr. Rininger and his chauffeur, the Doctor's sister, now

Mrs. Lyford, and a nurse, Miss Davis, were on their way from Kent to Seattle along this highway, and when they reached the top of the grade about 300 feet west of the tracks at this crossing, they were traveling at a rate of 15 to 16 miles per hour, with the chauffeur in charge of the automobile (Rec. 44, 46). At this point, the chauffeur released the clutch of his engine, and permitted the automobile to coast down hill toward the crossing under its own weight, but gradually diminished its speed, and as the automobile approached the crossing, both the chauffeur and Dr. Rininger looked both ways along the track and listened to ascertain if a car were approaching from either direction (Record 44). Dr. Rininger was sitting in one of the front seats beside the chauffeur and before reaching Riverton had been turned partly around engaging in conversation with the ladies who were seated in the rear seats. After the auto began to descend toward the crossing Dr. Rininger turned around and gave attention to ascertain if any car or trains were approaching (Rec. 44-49-50). The speed of the auto was decreasing (Rec. 53-143). The automobile had pneumatic tires, and as it coasted made very little noise. They heard no whistle or alarm or sounds from any approaching car. The electric alarm gong on the post did not ring, and when they were within about 55 feet of the track the chauffeur, again looked northward, and while he could see the railroad tracks at Allentown and a short distance south of it, he could not

see any approaching car, nor could Dr. Rininger, who then directed the chauffeur to continue. When they were within about 40 feet of the track, they were then running about 12 miles an hour (Rec. 53), and a moment later when they were within 25 to 30 feet of the track the chauffeur saw a southbound electric car approaching very rapidly, from 100 to 150 feet away (Rec. 45-53). This electric car was running about 35 miles per hour (Rec. 90-126-155-201). He at once applied his brakes, which were set so tightly that the automobile skidded and came to a stop just before reaching the track, in a slightly diagonal position to it, looking northward. The approaching car struck the right spring or goose neck of the automobile, and with such force as to throw out its occupants, excepting the chauffeur, and the Doctor was thrown under the wheels of the car and instantly killed. His sister was thrown onto the track, and the nurse, Miss Davis, was thrown across the track, and was so injured that she died therefrom (Rec. 93). hearing and eyesight of both the chauffeur and Dr. Rininger was good (Rec. 50-105).

There was no watchman or gates at the crossing (Record 49), and the only means provided by the defendant in error to warn travelers of the approach of trains, other than signals given by the train itself, were the electric gong and the red electric lights. This gong did not always operate (Rec. 226-234). Two classes of trains were operated by the defendant in error, one called "the local," which

stopped at the various stations between Seattle and Tacoma, and the other "the limited," which made no stops and ran at a high rate of speed, and it was the "limited" which collided with the automobile.

It was shown that Dr. Rininger had a large, lucrative practice as a surgeon and physician. That his earnings from his practice for the year 1910 was \$57,168.00, and for the year 1911 it was \$56,518.15, and for the year 1912 prior to July 25th it was \$38,418.00, or at the rate of \$67,425.00 per annum (Rec. 97), and that he was 42 years of age at the time of his death and that his life expectancy was 26 1-3 years (Rec. 106).

During the trial Mrs. Rininger, one of the plaintiffs, was called as a witness by the defendant in error and the following question was propounded to her:

"I wish you would state what the estate amounted to which you and your daughter received." This was objected to as irrelevant, incompetent and immaterial. The objection was overruled and an exception allowed (Rec. 225), whereupon the witness answered in substance that she and her daughter received from the estate of Dr. Rininger mortgage notes for \$60,000, being the balance due from the sale of the hospital; also \$5,437.00 in cash and the uncollected book accounts of about \$30,000.00.

During the examination of Mr. Brodnix, the chauffeur, he was asked the following questions: "You may state, if you know, what would be a

reasonable rate of speed to approach a crossing similar to this with an automobile of the weight of this automobile with the number of passengers in it that you had at the time." This was objected to on the ground that was the question for the jury to determine, which objection was sustained (Rec. 47). It was expected to prove by this witness that 12 miles per hour was a reasonable rate of speed to approach this crossing under the conditions named.

H. D. Hanford was called as a witness for the plaintiff in error, and stated that he was a civil engineer and had been for 18 years, and had resided in Seattle more or less since October, 1899; that he was the chief engineer in charge of the work of the construction of the Puget Sound Electric Railway and had general knowledge of the Riverton crossing. He was asked the following questions: "Was there any discussion at the time of the location and building of those tracks between you and the officers of the company respecting the character of this crossing whether or not as located it was or would be a dangerous crossing?" Also the following: "Do you know whether or not there was a plan considered at the time these tracks were laid out and constructed across this crossing by which a different method of construction of tracks could have been carried out and thereby reduced the danger to the traveling public in crossing those these questions were objected to as irrelevant and immaterial, which objections were sustained (Rec.

102). It was expected that the answers to these questions would disclose that at the time the crossing was built its dangerous character to the traveling public was recognized and considered by the witness and the officers of the company and that the witness proposed a reasonable plan for laying out the road at that point that would have greatly reduced, if not eliminated, the danger to the traveling public on account of the crossing, but was not adopted because such plan would have increased the cost of construction of the railroad at that point.

After the plaintiffs in error had rested their case, the Puget Sound Traction, Light & Power Company moved the court for an order withdrawing the case from the jury and directing a non-suit in its favor upon the ground that no evidence had been offered that connected the said defendant with the owning, operation or management of the railroad causing the death of Dr. Rininger, and that no negligence on its part had been shown. This motion was granted (Rec. 107). Thereupon the other defendant in error herein, moved that the case be withdrawn from the consideration of the jury and a judgment of non-suit be directed, that no negligence had been shown or proven against it and for the further reason that it affirmatively appeared from the plaintiffs' testimony that Dr. Rininger and his chauffeur, who was in charge of the automobile when the doctor was killed, were guilty of contributory negligence. This motion was denied, the court ruling that so far as the evidence concerning the

negligence on the part of the defendant in error, there was sufficient evidence of such negligence to go to the jury; that contributory negligence was a matter of defense and that a motion should be made at the closing of the case for a directed verdict (Record 107). After the defendant in error introduced its testimony and the rebuttal testimony on behalf of plaintiff in error submitted, and all parties had rested, the defendant in error being the only remaining defendant in the case moved that the jury be instructed to return a verdict in favor of it and against the plaintiffs in error, upon the ground that the testimony failed to show any negligence on the party of the defendant company, and that it affirmatively appeared from all of the testimony that Dr. Rininger and the chauffeur in charge of the automobile were guilty of such contributory negligence as to bar a recovery (Rec. 243). After argument, the trial court was of the opinion that Dr. Rininger and his chauffeur were guilty of contributory negligence, in this, that when they looked and listened in the moving automobile to ascertain if there was an approaching car from either direction, that they did not bring the automobile to a full stop, and that they approached the railroad crossing at a dangerous rate of speed sufficient to bar a recovery (Rec. 244-250). Whereupon said motion was granted, to which ruling an exception was allowed and the court thereupon instructed the jury that as a matter of law the plaintiffs in error could not recover, and directed the jury to return

a verdict in favor of the defendant in error, to which instruction an exception was allowed, and thereupon a verdict under the direction of the court was rendered in favor of the defendant in error and filed (Rec. 253). Thereafter a judgment was rendered and ordered against the plaintiffs in error dismissing the action and in favor of defendant in error for costs. Thereupon plaintiffs in error sued out a writ of error to review the action of the trial court.

### SPECIFICATIONS.

- 1. It was error on the part of the court to grant defendant's motion for a directed verdict in its favor, and also in instructing the jury to return a verdict for the defendant and in entering a judgment in this case in favor of the defendant. (Rec. 250)
- 2. It was error on the part of the court to rule as a matter of law that the deceased and his chauffeur were guilty of contributory negligence in not stopping the auto and looking and listening to ascertain if a car was approaching the highway, and also in determining as a matter of law that the deceased and his chauffeur approached the crossing at an unreasonable rate of speed, and that they approached the crossing at a dangerous rate of speed.
- 3. It was error on the part of the court to refuse to submit to the jury for their determination the issues in this case, and in determining as a matter of law that the deceased and his chauffeur approached the railroad tracks of the defendant at Riverton at a dangerous rate of speed and that

there was no issue that should have been submitted to the jury, and also in refusing to submit to the jury the question whether or not the deceased and his chauffeur were exercising reasonable care and diligence is ascertaining if there was any danger as they approached this crossing. (Rec. 248)

- 4. The court should not have permitted the following question to be asked the plaintiff, Mrs. Rininger, to-wit: "I wish you would state what the estate amounted to which you and your daughter received" and in requiring her to answer this under objections; the substance of the answer was "that the plaintiffs received \$60,000.00 in notes and mortgages from the sale of some property and uncollected bank accounts amounting to \$30,000, and that she herself received \$5,437.00 cash." (Record 225.)
- 5. The court should have permitted the following question propounded to Brodnix, "You may state if you know, what would be a reasonable rate of speed to approach a crossing similar to this in an auto of the weight of this auto with the number of passengers in it that you had at that time?" to be answered; the substance of the answer would have shown that twelve miles per hour was not an unreasonable rate of speed (Record 47).
- 6. The court should have permitted the witness Hanford to answer the following question: "Do you know, Mr. Hanford, from your knowledge as an engineer and also the experience that you had in laying out this track, whether or not the crossing

there could have been constructed so as to have eliminated or at least greatly reduced the danger of this highway crossing?" the answer would have shown that there was another and reasonable method of laying out and constructing said tracks at the Riverton crossing at a reasonable expense that would have greatly reduced the dangerous character of this crossing, and that the same was discussed by the witness, who was the chief constructing engineer, with the executive officers of the company that built the tracks (Record 103).

#### ARGUMENT.

Our chief grievance in this case was the action of the trial court in granting a motion for a directed verdict against the plaintiffs in error and in directing the jury to return a verdict for the defendant in in error and rendering a judgment for defendant in error based on such verdict.

This is our first specification which embraces our first, seventh and eighth assignment of errors.

In our second specification we challenge the correctness of the reasons assigned by the trial court in so directing a verdict for the defendant in error and rendering judgment therein, and this embraces our third, fourth and sixth assignments of errors.

Our third specification seeks for review the refusal of the court to submit to the jury for their determination the issues between the parties hereto and this embraces our second and fifth assignments of error. As a matter of fact the solution or determination of all of said specifications and the assignment of errors embraced therein depend upon the disposal of one general question and that is: Did the trial court err in directing that the evidence showed as a matter of law that the deceased was guilty of such contributory negligence, that was the proximate cause of his death, that barred the plaintiffs in error of any right of recovery, and as the disposal of such question alone will dispose of our first four specifications and our first eight assignments of errors, it becomes logical to treat all of them as one consolidated specification in our discussion.

No recovery could be had by the plaintiffs in error unless the defendant in error was guilty of negligence that caused the death of Dr. Rininger.

Inasmuch as the court announced in his ruling on defendants' motion for a non-suit that there was sufficient evidence of negligence on the part of the defendant that contributed to the collision, to warrant submitting this branch of the case to the jury (Rec. 107), we will not give much attention to this phase of the question other than what necessarily appears in the argument as we proceed, except to call attention to the fact that a large amount of travel passed over the Riverton crossing. As Seattle is bounded on the west by the waters of Puget Sound and on the east by the waters of Lake Washington, all vehicle traffic to or from the city must be from the north or south. Because of this and also because of the topography of the territory ad-

joining the south limits of Seattle, there is but this one main arterial highway leading south from the city through the White River Valley, and the numerous towns therein to Tacoma (Record 24-25-49). There was also guite a settlement around and in the vicinity of this crossing (Rec. 100), all of which served to develop a stream of traffic so great that during the day there were vehicles passing nearly all the time (Rec. 78-155), and one of the witnesses for defendants testified that he saw so many narrow escapes which were almost daily between autos and the cars on this track that he had a dread when he heard the gong ringing and saw autos attempting to cross these tracks (Rec. 160). There was a right angle turn of the highway and on the east side of the crossing and the view of approaching southbound cars was obscured to travelers from the west until they were within 40 feet of the tracks, and the noise of approaching cars was difficult to hear (Record 48), and yet the defendant in error operated its "Limited" cars over this crossing during the day time at a speed of 30 to 40 miles per hour, and at the time of the fatal accident, no gates. guards or flagman were maintained at the crossing to warn travelers of the danger of approaching swiftly moving cars or trains (Record 48).

The failure to maintain a flagman or gates at this crossing to warn travelers of the approach of the limited southbound cars, was negligence or at least the existence of these conditions was sufficient evidence to warrant the jury in finding that the defendant in error was negligent in failing to maintain such flagman or gates.

Grand Trunk Railroad vs. Ives, 144 U. S. 408.

Continental Improvement Co. vs. Stead, 95 U. S. 161.

Kowalski vs. Chicago G. W. Ry. Co., 84 Fed. 586.

Kowalski vs. Chicago G. W. Ry. Co., 92 Fed. 310.

Chesapeake & O. Ry. Co. vs. Steele, 84 Fed. 93.

Penn. Ry. Co. vs. Miller, 99 Fed. 529.

Burns vs. North Chicago Rolling Mill Co., 27 N. W. R. 43.

Thomas vs. The Delaware Lackawanna & Westery Ry. Co., 8 Fed. 729.

Kenyon vs. Chicago Northwestern Ry. Co., 96 A. St. Rep. 382.

Delaware and H. Ry. Co. vs. Larnard, 161 Fed. 520.

Chicago & I. Ry. Co. vs. Lane, 22 N. E. R. 513.

Simonson vs. M., St. P. S. S. M. Ry., 135 N. W. R. 745.

T. & P. Ry. vs. Cody, 166 U. S. 606.

Recognizing the dangerous character of this crossing, the defendant in error had installed an electric gong which the approaching car set to ringing to warn travelers that cars were about to cross this thoroughfare (Record 26, Exhibit 10), but this

gong did not always operate or ring when it should (Rec. 227-234), and six witnesses who saw this collision testified that this gong did not ring as the colliding car came to the crossing (Rec. 45-49-56-64-74-79-90-94). Furthermore, the two occupants of the damaged automobile who testified stated that they heard no signals, whistles or noise of the approaching car and one of them was the chauffeur who was listening therefor (Rec. 94, 99). others who were near the tracks for several minutes at and before the collision stated that no whistles or other signals from the operating car was given (Rec. 64-74). Another witness who was familiar with the crossing and was approaching it from behind this auto stated, that there was no whistles or noise from this car (Rec. 79), and another witness who was standing on the passenger platform at the crossing and who saw the car as it left Allentown and until it reached the crossing, stated it did not blow any whistles or give any other alarm signal of its approach (Rec. 90). The failure of this gong to operate or the train crew to blow a whistle or to give them some alarm signal as it approached the crossing was negligence on the part of defendant in error in operating this car. Hence the evidence of the defendant in error's negligence was complete.

After reading the expressions of the trial court in granting the motion of defendant in error for an instructed verdict in its favor, one reaches the conclusion that it was the opinion of the court that Dr. Rininger or his chauffeur should have stopped the automobile and listened for sounds of an approaching car, and for this reason they did not exercise reasonable precaution in approaching said crossing to ascertain if there was any apparent danger in crossing the tracks at that time.

The rule that is now adopted, governing the question whether one injured at a railway crossing is guilty of such contributory negligence as will bar him or his representatives from recovery, is tersely stated as follows:

Was the deceased at the time of the fatal accident, under all the circumstances of the case in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful man under similar circumstances?

Grand Trunk Ry. Co. vs. Ives, 144 U. S. 408. Flanmelly vs. Delaware & Hudson Ry. Co., 225 U. S. 601.

Cincinnati Ry. Co. vs. Farra, 66 Fed. 496. L. & N. Ry. Co. vs. Summers, 125 Fed. 719. D. L. & W. R. Ry. vs. Devore, 122 Fed. 791.

It may be stated that one about to cross rail-road tracks at a lawful place must use his senses of sight and hearing in making a reasonable effort to ascertain if he may safely proceed. In other words, he must look and listen in a reasonable place and manner relatively to said crossing to a reasonable degree to determine whether his safety is imperiled. There is no fixed rule that he must stop some distance before raching the track and look and listen for evidences of danger before proceeding.

Whether one should come to a halt and then exercise the senses depends upon all of the surrounding conditions and the known dangers to the traveler.

In the case of Grand Trunk Ry. Co. vs. Ives, supra, one Elijah Smith was driving into the city of Detroit in a covered buggy over a route that he had traveled daily many years. This road had much travel and crossed the tracks of the railroad company obliquely. For a distance of three hundred feet along the right side of the road going to the city there were obstructions to the view of the railroad consisting of houses, barn, outbuildings, an orchard, trees and shrubbery, so that a traveler must be within fifteen feet of the track or his horse within eight feet before he could get an unobstructed view of the track. Mr. Smith stopped his horse some distance before he could get a clear view of the track, and looked and listened for approaching trains. He then drove on but did not stop again after he had reached the point where he had a clear view of the tracks. He saw other trains passing on a further track and its noise prevented him from hearing a train approaching on the near track. He drove upon the crossing and was killed by the near train approaching from the right. In an action to recover damages for his death the railroad company relied upon the defense of contributory negligence of the deceased in failing to stop when he knew he had reached a point where he could see the tracks both ways and then look and listen for danger, for had he done so he would readily have seen the train and avoided it. And further contended that the court should as a matter of law have so determined and instructed the jury to return a verdict for the company. The trial court submitted the question to the jury for it to determine whether under all the circumstances the deceased was negligent.

The railway company asked the court to give the following instruction:

"If you find that the deceased might have stopped at a point fifteen or eighteen feet from the railroad crossing, and there had an unobstructed view of defendant's track either way; that he failed so to stop; that instead the deceased drove upon the defendant's track, watching the Bay City train, that had already passed, and with his back turned in the direction of the approaching train, the deceased was guilty of contributing to the injury, and your verdict must be for the defendant, although you are also satisfied that the defendant was guilty of negligence in the running of the train in the particulars mentioned in the declaration."

"This instruction was refused on the ground that it is too much upon the weight of the evidence and confines the jury to the particular circumstances narrated without notice of others that they may think important."

Justice Lamar in his masterful review of the cases bearing on the subject, says: "The determination of what was such contributory negligence on the part of the deceased as would defeat this action

or perhaps more accurately speaking the question whether the deceased at the time of the fatal accident was under all the circumstances of the case in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person under similar circumstances was no more a question of law for the court than was the question of negligence on the part of the defendant," and in affirming the refusal to give the quoted instruction says, "In determining whether the deceased was guilty of contributory negligence, the jury were bound to consider all of the facts and circumstances bearing upon the question and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others."

Another instructive case is found in New York, S. & W. Ry. Co. vs. Moore, 105 Fed. 725, where it appears that the plaintiff was proceeding along the highway which led across the tracks of the defendant in the village of Unionville, N. Y. He was driving a pair of horses attached to a milk wagon, approaching the crossing from the west. The railroad at that point ran north and south, intersecting the highway at right angles, but at a short distance south of the crossing the railroad curved sharply to the eastward. Approaching the crossing from the west, the view of the railroad to the southward was obscured for a considerable distance. Near the tracks, obstructing the southerly view, was a store building and between it and the

main tracks was a switch track upon which stood a box car on the west side of the tracks at the time of the accident. The plaintiff was proceeding along at about 9 o'clock in the forenoon on a clear day and was looking and listening for any passing trains but did not stop for that purpose. Not hearing any trains, although he knew one was due at that time, he proceeded to cross the tracks and was struck by a fast passenger train coming from the south. The plaintiff was familiar with the surrounding conditions. There was conflicting testimony as to whether the approaching train blew any warning whistles. Upon the trial the railroad company urged the trial court to direct a verdict for it upon the ground that as a matter of law the plaintiff was guilty of contributory negligence which barred his recovery. The court refused to do this, but submitted the question to the jury, which found for the plaintiff. In affirming the action of the lower court, Judge Wallace says, "If the jury believed the testimony on behalf of the plaintiff, the approaching train, because of the obstructions in the way, could not be seen by him until his horses were practically upon the track when it was too late to escape a collision, and he could only discover its approach by his sense of hearing. If his testimony was true, he used all his faculties diligently and did everything that any prudent man would have been likely to do while crossing the track unless he should have stopped his horses to listen more perfectly. His testimony may be incredible and it

may seem unaccountable that he did not hear the noise of the approaching train, but the jury were at liberty to credit his narrative. In approaching a railroad crossing the injured party is not to be deemed guilty of contributory negligence because he did not exercise the greatest degree of diligence which he could have exercised, but only if he fails to exercise such care as a prudent man approaching such a place would. Whether he ought to stop in a given case is a question for the jury to decide in view of the circumstances developed."

We call the court's attention to the case of C. N. O. & T. P. Ry. Co. vs. Farra, from the Sixth Circuit, reported in 66 Federal 496. The plaintiff, a woman, was driving a horse and buggy along a country road that intersected the track of the defendant; with her were her two small children, one a babe on her lap. The horse was gentle. Both highway and track approached the crossing through considerable cuts. The course of the highway was a heavy descending grade to the track. The railroad approached the crossing on a curve through a deep cut. An approaching train could not be seen by the approaching traveler until they were within a few feet of the track, all of which was well known to the plaintiff, who admitted that she knew that it was a dangerous crossing. The plaintiff drove down the highway toward the track, looking and listening for any indication of an approaching train, but did not stop her horse. Not discovering any indication of an approaching train she continued to drive across

the track, where she was struck by a train and injured. The evidence was conflicting as to whether any whistle was blown by the engineer. Upon the trial the defendant requested an instruction from the court to the effect that under the conditions in this case it was the duty of the plaintiff to have stopped her horse before crossing the track and looked and listened for a train. This instruction was refused, but the court did in substance state to the jury that it was for them to say whether the plaintiff exercised such care and such prudence under the circumstances as a careful and prudent person should have done. The jury found for the plaintiff. Judge Lurton in the opinion affirming the action of the lower court after referring to the case of Grand Trunk R. vs. Ives, supra, and also referring to the contention of the railroad company that the noise of the plaintiff's vehicle as she drove along interfered with her hearing and had she stopped, her hearing would have been more acute, uses this language. "The fundamental rule concerning the care to be exercised at a public railroad crossing by a traveler is that he must exercise that degree of caution usually exercised by prudent persons conscious of the danger to which they are exposed at such crossing. The Pennsylvania rule which seems to make it the duty to stop under all circumstances regardless of obstructions to the view or obstacles to the hearing has never met with general acceptance, and seems much calculated to condone carelessness and recklessness by railroad companies at

public crossings where the rights and duties of the public and of the company are reciprocal, neither are we prepared to say that the duty of stopping is imperative in all cases where the track is obscured. There may be circumstances as in the Ives case and in the case at bar where the duty is debatable and proper for the consideration of the jury."

In another case we have the following facts: A young man was driving a team of horses hitched to a lumber wagon on a highway leading across railroad tracks where there were obstructions interfering with the view of approaching trains. His team was going on a jog trot. The wagon was old and made considerable noise. He was familiar with the crossing and was looking and listening for trains, but did not stop his team for that purpose. While going across the track he was struck by a train and injured. Upon the trial contributory negligence was the defense relied upon. The company contending that the plaintiff should have stopped his team (which was under a slow trot) looked and listened. From a verdict and judgment for the plaintiff the defendant appealed. The Supreme Court of Illinois say in affirming the judgment: "The duty of a person approaching a railroad crossing with a wagon and team, even when such wagon is old and makes considerable noise. and when he knows there are obstructions, which to some extent interfere with the view of an approaching train and also knows a train is due

about that time, to bring his team to a full stop before driving upon the railroad track, is not so absolute and unqualified as that a court can say as a matter of law and regardless of all other attendant circumstances that such person is guilty of a want of ordinary care in failing so to do. It is for the jury to determine from all the facts and circumstances in proof whether or not there was negligence."

Chicago & Iowa Ry. Co. vs. Lane, 22 N. E. 513.

A case that is frequently referred to approvingly embraces these facts: The plaintiff was driving away from a village with a team hitched to a farm wagon over a frozen highway that led across a railroad crossing. He could not see a train coming from the north by reason of a cut and intervening obstacles. As he drove along he looked and listened for trains, but his wagon produced much noise over the frozen ground and his hearing was somewhat impaired. He did not stop his team before crossing the track. He failed to discover an approaching train and was struck and injured by it. Upon the trial counsel for the railroad company requested an instruction to the effect that if one is approaching a known dangerous railroad crossing and if by reason of the character of the ground or other obstructions or defect in sight or hearing he cannot determine with certainty whether a train is approaching without stopping, looking and listening, then it is his duty to do so and

if he fails to do so and is injured he cannot recover. The Supreme Court of the United States refused to adopt such a rule but did say "both parties are charged with the mutual duty of keeping careful lookout for danger and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty."

Continental Improvement Co. vs. Stead, 95 U. S. 161.

A strong illustrative case is found in C. & N. W. Ry. vs. Netolicky, 67 Fed. 665. A few miles south of Cedar Rapids, Iowa, the main thoroughfare leading to that city crosses a railroad track. This crossing was more or less dangerous because of the large number of vehicles passing over it daily. On account of obstructions the view of approaching trains from the east was obscured for some distance. At times these obstructions interfered with the noise from approaching trains, making it difficult to hear them. The deceased was driving along this highway, which was frozen, toward the crossing with a team and empty wagon with a rack for hauling wood on it. As he attempted to cross the tracks he was struck and killed by a train from the east. He was trotting his team until he neared the crossing, but did not stop and his wagon made considerable noise in passing over the frozen ground. The trial court was requested to direct a verdict for the railroad company on the ground that it was obvious that the deceased was guilty of contributory negligence because he did not take reasonable precautions to ascertain the danger of the approaching train by stopping and listening before driving onto the track. This was refused, but the question of the deceased's negligence was submitted to the jury, which found for the plaintiff. In disposing of this contention the Circuit Court of Appeals say: "It does not occur to us that the mere fact of his near approach to the track before discovering the train was in itself a circumstance which conclusively established a want of ordinary care. The conditions surrounding him were such that it is by no means improbable that he may have been exercising his sense of hearing and his other faculties with as much diligence as the law exacts." The Court further declared that there was no error in submitting the question to the jury.

In the case of St. L. & S. F. Ry. Co. vs. Barker, 77 Fed. 810, plaintiff was driving an ox team attached to a wagon over a country road toward a dangerous crossing. The view of a train from the north was obscured by a pile of railroad ties, and further on by a cut, but when one was within 12 or 16 feet of the track, he could then get a clear view. The plaintiff listened and looked for trains while proceeding but did not stop to do so. There was more or less noise from his wagon. He discovered an approaching train from the north when too near the track to avoid it and was injured. Again the rail-

road company requested an instructed verdict in its favor on the ground that the failure of the plaintiff to stop at a point where he knew he had a clear view of this track and look and listen for trains was, as a matter of law, contributory negligence sufficient to prevent his recovery. This was refused. On writ of error the principal contention was that the plaintiff should have stopped his team and looked and listened, and that because he failed to take these precautions he was, as a matter of law, guilty of contributory negligence. The court refused to assent to this view and say that where intervening objects obstruct the traveler's view in either direction from the crossing it is his duty to be more vigilant in listening for the sound of approaching trains, but there is no imperative rule requiring the traveler to stop and listen before crossing the tracks; that as a general rule the jury should be allowed to determine whether the conditions were such that in the exercise of reasonable care the traveler should have stopped and listened.

Where a young man trotted his team toward and upon a known dangerous railroad crossing where the view of the tracks was obstructed, he looked and listened but did not stop. In discussing whether or not the trial court should have determined as a matter of law the deceased was guilty of contributory negligence, the Supreme Court of Iowa says:

"We are of the opinion that the plaintiff's

conduct should be judged in the light of all the facts and circumstances that then attended his act and from that say whether or not a reasonably prudent and cautious man having due regard for his own safety would under such facts and circumstances, have conducted himself as did the plaintiff."

Plattor vs. C. G. W. Ry., 142 N. W. R. 213.

The following cases are based upon a similar state of facts as the foregoing instances and in each case it was declared to be the province of the jury to decide whether the plaintiff in approaching the crossing with his team was exercising such care and caution for his own safety as a reasonably prudent man would do under like conditions.

Harshaw vs. St. L. I. & M. Ry., 159 S. W. R. Dusold vs. C. & G. W. Ry., 142 N. W. R. 214. Simonson vs. M. & St. L. Ry., 135 N. W. R. 745.

Silensky vs. P. G. W. Ry., 94 N. E. R. 272. N. P. Ry. vs. Austin, 64 Fed. 211. Judson vs. Ry. Co., 158 N. Y. 597.

We confidently assert that the principles announced in the foregoing cases prevail generally in all jurisdictions in this country when applied to similar state of facts.

It may be urged that travelers in automobiles are charged with greater diligence in crossing railroad tracks than those who travel by teams, but why should they be held to any higher degree of care toward railroads in crossing their tracks than those who are in horse driven vehicles? Are the privileges or rights of motor driven vehicles any less toward railroads at highway crossings than those of animal driven vehicles? If so in what respect?

Motor driven vehicles are no longer experimental objects, nor usable only for pleasure purposes. They have become one of the most useful and standard appliances for general business and one of the most reliable means of transportation of both individuals and freight with the field for its usefulness constantly increasing, so there can be but one answer to the above query and that is that motor driven vehicles have the same rights and privileges and are subject to the same conditions when traveling on the public highways, over rail-road crossings, in their relations to railroads as are animal driven vehicles.

Cases from courts of last resort bearing upon this question are few owing to the recent origin of automobiles, yet such decisions as are at hand support the above rule except two cases where the opinions were written by Judge Buffington of the Third Circuit Court.

In Walters vs. C. M. S. S. Ry. Co., 133 Pacif. 357, the plaintiff was driving an auto along a public highway and on crossing the tracks of the defendant outside of the city of Anaconda was struck by a train and injured. As plaintiff approached the crossing he looked and listened from the moving auto but did not stop and listen, although his

view of the tracks was obstructed by roadway cuts. The appellant contended that under the circumstances similar to the case at bar the auto driver should stop, look and listen, and founded their claim upon the two cases referred to.

The Supreme Court of Montana refused to adopt the rule contended for, and we believe logically and successfully pointed out the weakness of Judge Buffington's reasoning, and further say, "If they (these two cases) are to be taken to hold in the absence of express statute that it is contributory negligence as a matter of law for the driver of an automobile not to stop, look and listen before using a highway crossing without regard to whether ordinary prudence would require such a course they are contrary in spirit to the rule announced by the superior authority of the Supreme Court in G. T. Ry. vs. Ives, and against the weight of general decision.

"The law is that one desiring to cross a railroad track must use reasonable care for his own safety. We see no reason to change these rules either for or against any class of vehicles in lawful use." (Citing twelve cases.)

So in the case of *Dickinson vs. Erie R. Co.*, 37 L. R. A. (N. S.) 150, the plaintiff was driving in an automobile towards a railroad crossing consisting of three tracks which ran east and west. His view of the tracks and of the crossing was obstructed by a high bank running parallel with the highway and also by a freight shed, and telegraph

poles near the tracks. When plaintiff was within 200 feet of the crossing he coasted down to it at a low rate of speed but looking and listening for noises of any possible approaching train. too near the track to safely stop he discovered a swiftly moving train coming towards him. He jumped from the auto but was injured by the train. In an action brought to recover damages he was non-suited because he did not stop his auto at a safe distance and look and listen for the train. On appeal this was held to be error, the court stating the general rule relating to railway crossings, and that it was for the jury to determine whether under the circumstances the plaintiff had acted as a reasonably prudent man would act under similar circumstances.

So in a case where one drove towards and upon a railroad crossing in a noisy automobile where the view of the tracks in one direction was obscured, who looked and listened for trains but did not stop the motor nor the automobile so that he could hear more distinctly, and was killed by a train from the obscured direction, the above rules were applied, and the Supreme Court of Minnesota declared, "A court ought not to take upon itself to say that fair minded men may not conclude under all the evidence that deceased did look and listen for approaching trains as cautiously as ordinarily prudent persons would do in a like situation.

Green vs. G. N. Ry. Co., 144 N. W. R. 722. So the Supreme Court of North Dakota in hold-

ing that there is no absolute duty for an automobile driver to stop before crossing railroad tracks say: "It cannot be said as a matter of law that a prudent person under like circumstances would have stopped. Under the better considered cases plaintiff cannot be held guilty of contributory negligence as a matter of law merely because he did not *stop* and listen before crossing the tracks." The fact that if the automobile had been stopped the occupants might have heard the approaching train was held not decisive of their negligence.

Pendroy vs. G. N. Ry., 117 N. W. R. 531.

To the same tenor are the cases of:

Lockridge vs. M. & St. L. Ry., 140 N. W. R. 234.

Adams vs. G. H. & S. A. Ry., 164 S. W. 853. Pendroy vs. G. N. Ry., 117 N. W. R. 531.

In overruling the contention that greater care is required of automobile drivers than that of drivers of other vehicles it is said, "Many of the courts including those of our own state expressly recognize that the same rule as to care at crossing should be applied to drivers of automobiles that is applied to drivers of other vehicles."

C. L. R. Ry. vs. Wishard, 104 N. E. R. 593.

Do the rules above announced apply to this case?

In reviewing a judgment of non-suit or a directed verdict for defendant, none of the evidence of the plaintiff can be disregarded and the record must be considered in its most favorable aspect toward the plaintiff.

The evidence was sufficient to establish the following facts: The defendant's double-tracked roadway from some point north of Allentown to the Riverton crossing, being a distance of over a quarter of a mile, was built on a westerly curve alongside of a bluff (Exhibit 10). In fact, for a portion of this distance the roadbed was excavated into the bluff, which was from 18 to 44 feet high (Exhibit 10). The southbound cars ran on the west track and the limited trains were operated at a high rate of speed. Nearly two years before this collision the defendant had installed an automatic electric alarm gong on a conspicuous post at this crossing, which was set in motion by the southbound car (Record 116). The main highway leading north from Seattle carrying a heavy and constant travel crossed these tracks at Riverton (Record 78). Leading west from the crossing this highway had an ascending grade of 4 per cent (Record 25), and was freshly covered with a pitch composition and rock screening, which softened on a hot day (Record 189). A traveler on the crossing has a clear view of both tracks from the crossing to Allentown, but when he was 50 feet west of the crossing he could see both tracks at Allentown, but he could not see an approaching car on the west track all the way between these two points, as the car would be lost to view because the curve carried it into the bank and could not be seen again by

such traveler until it was within 50 feet of the crossing (Record 68). The steep curved bank deflected all sounds from such car to the eastward so that it was difficult to hear the approaching car until it was practically at the crossing (Record 48-81). There was nothing to inform or warn the casual traveler of these unusual conditions, and they could only be discovered by a series of actual observations of an approaching southbound car, so that one not familiar with all these conditions in coming down the grade and reaching a point 50 or 60 feet west of the crossing could stop and see the tracks at Allentown and would assume that he could see any approaching car all the way between that point and the crossing, and could listen for the noise of any such car and could neither see the car because it would be obscured in the bank and not har it because the noise of it would be deflected away and then he would feel perfectly safe in crossing the tracks. On July 25, 1912, Dr. Rininger and his chauffeur and two other occupants approached this crossing from the south. When within 300 feet the chauffeur released the engine from the clutch and the auto proceeded down grade under its own momentum (Record 44-46). Both the deceased and the chauffeur looked and listened for any indications of an approaching car (Record 44-49-60). The Doctor, who was sitting in the front seat, had been partly turned around looking backward in conversation with his sister, faced forward as they proceeded so that he could more readily use his faculties for looking and listening (Record 50-94). As it is presumed that men act for their safety, we must assume that he knew nothing of the unusual and not readily discernible physical conditions that prevented one from seeing or hearing a southbound car at this crossing.

N. P. Ry. vs. Spike, 121 Fed. 44.

C. & O. Ry. vs. Steele, 84 Fed. 93.

Thomas vs. Ry. Co., 8 Fed. 729.

Dusold vs. C. & G. W. Ry., 143 N. W. R. 214.

B. & O. Ry. vs. Landrigan, 191 U.S. 761.

The chauffeur did not know of these peculiar conditions (Record 48-106). The speed of the automobie was slackened to twelve miles per hour (Record 53-78). As they proceeded both looked both ways along the tracks (Record 52). They could see the tracks at Allentown but saw no car between it and the crossing. They listened but could hear no sounds. They heard no whistles or other alarm. The electric gong was silent and yet they were within 50 feet of it. While it is true that the engine was running, yet the chauffeur stated that the noise from it was slight and would not have prevented him from hearing the car (Recerd 55). Who can say that had they stopped 100 or 90, or even 60, feet west of the crossing they would have seen or heard the approaching car? Not hearing or seeing any evidence of danger they pursued their course. Did they not use reasonable precaution to ascertain the existence of any danger? Had this case been submitted to the jury

and it had returned a verdict in plaintiff's favor, it could not be successfully urged that there was no evidence to sustain such verdict. There was no flagman or gates at the crossing to warn travelers of danger (Record 49), but the defendant had been content to install an automatic gong to give such warning and when it was installed for that purpose the public had a right to place reliance upon it. While the public was not relieved of the duty to exercise caution in passing this crossing, by reason of the installing of this alarm, yet it served to relax the vigilance of the traveler.

Thompson on Negligence, 2nd Ed., 1531-1582.

Kimbal vs. Friend, 27 S. E. 901. Dusold vs. S. & G. W. Ry., 142 N. W. R. 214.

The failure of this gong to ring at that time would be the same as if gates had been installed at the side of the crossing and were open. In such case it should be considered as an important circumstance in determining whether the duty of exercising due care by the traveler was exercised.

Dusold vs. C. & G. W. Ry., supra.
D. & H. Co. vs. Larnard, 161 Fed. 520.
Thompson, "Negigence," 2nd Sec. 1613.

No warning of its approach was given from the car itself. All of these conditions tended to allay the deceased. When they were within 25 or 30 feet of the crossing the hidden car appeared 100 feet away traveling at a speed of at least 35 miles per hour (Record 45). Then the chauffeur did everything in his power to avert disaster, set his brakes and brought the auto to a standstill, but one of the springs of the auto protruded sufficiently to catch the overhang of the electric car, which jerked and threw the auto around, thereby throwing out its occupants, causing Dr. Rininger to fall under the electric car (Record 45).

It appears to us that the evidence in the case at bar makes a stronger case for the plaintiff in error for the submission to the jury of the question of the exercise of reasonable precaution as announced in G. P. Ry. vs. Ives, supra, than do the facts in any of the cases heretofore referred to, and that it was error for the trial court to refuse to submit the issues to the jury.

It will be contended that the evidence of the defendant served to disprove the plaintiff's case. It is unnecessary to remind this court that it is only the jury that can determine what facts are established by disputed testimony. Nevertheless, we do not hesitate to enter into a comparison of the testimony for the respective parties. The testimony on behalf of the plaintiff as to the rate of speed of the auto was that of the chauffeur driving it, who had several years experience in operating and repairing automobiles. Also that of Mr. Lamb, another experienced auto driver who saw the moving auto; also that of Mr. East, who was driving a light delivery team just behind it. To this may be added the testimony of Mr. Rosenberg, the defendants

star witness, who watched the auto pass and observed that it was reducing its speed (Record 148). To controvert this, a Mr. Apt, who was a farmer and whose only experience at measuring distances was in stepping spaces for fence posts, and who had no experience in running automobiles (Record 197), and who happened to look out of the car window (he being a passenger on the car) a moment before the collision, testified that he thought the auto was going as fast as the car, which was 30 to 35 miles per hour (Record 193). The defendant also relied upon the testimony of two experts who stated hypothetically that if the skid marks of the auto wheels were 39 feet long, the auto must have been going 30 to 35 miles per hour (Record 177-179). Yet one of them stated that an auto would not skid until it reached a speed of 20 miles per hour (Record 178), while the other stated that it would skid at any speed over 10 miles per hour (Record 181). Another expert in the employ of one of the defendants stated that if the skid marks were 30 feet long the auto must have been running 30 miles per hour (Record 205). This was followed up by a witness testifying that 18 months after the collision he remembered that at the time of the collision he had sighted from his window across the road to a parallel board fence, and the west end of the skid marks began at this line and just before the trial he measured it and found that it was 39½ feet from such line to the tracks (Record 150). But another of defendant's witnesses stated that the skid marks ended 13 feet

from the tracks (Rec. 194). This would make the greatest length of the skid marks 261/2 feet long. A boy 14 years of age when the collision occurred, who had never driven an auto and had only ridden once or twice in one, and who saw the auto approach him head on, stated that he thought it was going 25 to 30 miles per hour (Record 168-170). An expert on the part of the plaintiff testified that the speed of an auto could not be reliably determined from the skid marks. That one could drive the same auto over the same pavement on the same day at the same rate of speed and after locking the brakes the auto would not skid the same distance each time (Rec. 238). One of the defendant's witnesses testified that he was a passenger on the car, that he looked out of the window and saw the auto 50 feet away and it was going as fast as the car. Another similar passenger saw the auto 25 feet away and it was standing still. It would be unreasonable to expect intelligent jurors to accept the evidence of such experts and of such inexperienced witnesses relative to the speed of the auto as against the testimony of experienced eye witnesses.

As an instance of the variation of the defendant's witnesses as to distances we call attention to another feature. It appears that the auto remained stationary where it landed after being hit, for several hours, and the several witnesses saw it and were asked to give its distance from the track. Their answers ranged from 8 feet (Record 124) to 30 feet (Record 133). This was really an immaterial

point, nevertheless it serves to show how unreliable the estimates of the skid marks are.

Again upon the subject of whistles from the train, some of the passengers on the car stated that they heard the crossing whistle after the car left Allentown. Others did not. While four witnesses of the plaintiff exclusive of the occupants of the auto, who were near the crossing, stated that they heard no whistles, and the defendant's principal witness stated that he only heard one signal after the car left Allentown, and as the motorman testified that he blew his whistle several times after he came in sight of the auto this must have been the whistle that Rosenberg heard.

In regard to the electric gong not ringing there were six witnesses for the plaintiff who were near the gong at and a moment before the collision who swore the gong did not ring. Some of the passengers on the car stated they heard it, others did not, but all who heard the gong were sure there was but one gong ringing. There was a gong on the car controlled by the motorman and it appears that the motorman rang this gong as he saw the auto (Record 215-216). This unquestionably was the gong that was heard.

# II.

Our fourth specification which is based upon the ninth assignment of error, challenges the ruling of the court in permitting Mrs. Rininger, one of the plaintiffs, to be interrogated concerning the amount of property that was left by the deceased to the plaintiffs.

It is apparent that this evidence was sought for the purpose of unfairly influencing the jury. The amount of the estate inherited by the plaintiffs would not enter into, nor affect the measure of recovery. If the plaintiffs had not inherited anything from the deceased, and had been destitute, it would not have been proper for the plaintiffs in error to have shown such fact to the jury.

Our fifth specification complains of the refusal of the court to permit the plaintiffs to offer evidence to the jury showing that 12 miles an hour is a reasonable and safe rate of speed for the automobile to approach and drive across a crossing. This evidence was excluded by the court upon the ground that it was for the jury to determine whether such speed was reasonable. It would appear that the jury should have some evidence from experienced men as to whether this was a reasonable or unreasonable rate of speed, and the court should not have assumed that all members of the panel were familiar with the operation, driving and control of automobiles, and he must have assumed this fact in order to reach the conclusion that the jury could determine the reasonableness of the rate of speed.

The court finally determined that it was not the duty of the jury to determine whether this rate of speed was reasonable, but that it was for the court to determine as a matter of law whether or not the deceased and his chauffeur approached the crossing at a reasonable rate of speed and in order to do this he was obliged to determine at what rate of speed they were actually traveling. The evidence of the plaintiffs tended to establish one rate of speed, while the evidence of the defendant tended to show that the rate of speed was higher. This again was a disputed fact, and it was peculiarly the province of the jury to sift the conflicting evidence on this point and then ascertain the rate of speed.

The object of the plaintiffs in error in offering the excluded testimony was for the very purpose of meeting this contingency, and when the court excluded it on the ground that it was for the jury to determine whether or not the speed shown by the plaintiffs was reasonable, the plaintiffs had a right to assume that the question would in fact be left to the jury.

It may be urged that the court's final ruling assumed that 12 miles per hour was an excessive rate of speed to drive towards or upon the crossing and that we were not prejudiced by excluding this testimony, but the court had no right to determine as a matter of law that the speed of twelve miles was dangerous. There was no evidence that such a speed was dangerous and the court refused to admit evidence that it was reasonable (Rec. 47). If we were permitted to step outside of the record we could say that all experienced auto drivers would say that this was a reasonable rate of speed. Indeed, the testimony of defendant's expert witness

indicated that twelve miles per hour was a reasonable speed.

In two of the cases heretofore quoted by us the injured party was trotting his team as he neared the track. Practical experience demonstrates that an automobile running twelve miles per hour is as much under control as a trotting team. There is no rule by which it can be determined as a matter of law what is reasonable or an unreasonable rate of speed for an automobile to proceed toward or cross railroad tracks. In the very nature of things it should be the province of the jury to determine whether the speed was reasonable when considered in relation to all of the surrounding circumstances.

It may be urged that the court ignored all of the testimony of the plaintiffs as to this rate of speed and found that the deceased approached the crossing at 30 miles per hour. If this is true then it is clear that the court was wrong, for in weighing the evidence for a directed verdict he must accept the most favorable view of plaintiffs' evidence, and cannot determine which is the correct version of a disputed fact. Furthermore it would be unreasonable for the court to assume the speed was 30 miles. The only support for such a finding is the testimony of a farm hand with no knowledge of measurements, speed or automobiles, or a fourteen-year-old inexperienced country boy attempting to fix the speed of an approaching automobile, or the testimony of experts to give the rate of speed

from the skid marks, and which skid marks were assumed to be 39 feet long, and yet the most favorable testimony of the defendant show that the greatest possible length of the skid marks was only 261/2 feet.

It is suggested by one witness that the skid marks appeared to be burned into the street and it is intimated that this is circumstantial evidence of excessive speed. The explanation of this appearance is simple. The highway had been macadamized some years before. A few weeks before the collision a new surface had been given it consisting of a tar and asphaltum composition. This was of the consistency of thick molasses and after being spread on the surface rock screening was sifted on it to absorb it. The heat of the sun would soften it so that it would ooze to the surface, then additional screening would be placed on it. This would occur during the entire season (Rec. 189). It is not surprising to find that when a heavy automobile skidded on this surface on a hot day that the skidding wheels would burrow into it.

Therefore the court committed error in refusing the admission of this testimony.

## IV.

Our thirteenth assignment of error is based on the refusal of the court to permit the witness Hanford to testify concerning the plans that had been considered at the time the tracks of the defendant were built to eliminate or minimize the dangerous character of this crossing (Record 103).

If the defendant knew of the dangerous character of this crossing and if there was a reasonable plan which could be carried out at a reasonable expense by which the dangers of this crossing could be reduced if not entirely eliminated, then it was negligence on the part of the defendant to operate its cars thereon at a high rate of speed without adopting and carrying out such plans or maintaining suitable safeguards to protect the traveling public from the dangers of the crossing. This proposed evidence disclosed both knowledge of its dangerous character by the officers of the defendant and a reasonable plan to remedy it. This was evidence to prove negligence on the part of the defendant when considered with the other evidence that no flagman, gates or other means were maintained by the defendant to warn the public of peculiar and not readily observible conditions surrounding this crossing. The exclusion of this testimony was prejudicial error against the plaintiff.

We therefore respectfully submit that it was error on the part of the trial court to direct a verdict and enter judgment thereon against the plaintiff in error and that the cause should have been submitted to the jury to determine the issues between these parties and that this case should be reversed.

H. H. A. HASTINGS, L. B. STEDMAN, Attorneys for Plaintiff in Error.

# United States Circuit Court of Appeals

#### FOR THE NINTH CIRCUIT

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, her Guardian,

Plaintiffs in Error,

VS.

PUGET SOUND ELECTRIC RAILWAY, a Corporation,

Defendant in Error.

# BRIEF OF DEFENDANT IN ERROR AND MOTION TO DISMISS

Upon Writ of Error to the United States District Court for the Western District of Washington,

Northern Division.

JAMES B. HOWE, HUGH A. TAIT,

Attorneys for Defendant in Error.

Seattle, Washington.

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# No. 2450

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# BRIEF OF DEFENDANT IN ERROR AND MOTION TO DISMISS

Upon Writ of Error to the United States District Court for the Western District of Washington,

Northern Division.

### MOTION FOR DISMISSAL.

Comes now the defendant in error and moves the Court that the writ of error in this proceeding be dismissed, upon the grounds that the judgment sought to be reviewed is a joint judgment in favor of defendant in error, Puget Sound Electric Railway, a corporation, and Puget Sound Traction, Light & Power Company, a corporation; that said Puget Sound Traction, Light & Power Company is not named in the writ of error or citation, or in any way made a party to the proceedings seeking to review said judgment by this court; that no proceeding on the part of plaintiffs in error by way of summons and severance, or its equivalent, was taken or had; and that no notice of said writ of error was given to said Puget Sound Traction, Light & Power Company, nor any opportunity given it to be heard in this court, or upon said writ of error.

This motion is based upon the bill of exceptions and the record in this cause.

JAMES B. HOWE, HUGH A. TAIT, Attorneys for Defendant in Error.

To the above named Plaintiffs in Error, and to H. H. A. Hastings, Esq., and L. B. Stedman, Esq., their attorneys:

You, and each of you, will please take notice that the foregoing motion to dismiss the writ of error in this cause will be called for hearing and argument before the United States Circuit Court of Appeals for the Ninth Circuit, at the Court Room of said court, in the City of San Francisco, State of California, at the opening of court, on the 10th day of November, 1914.

JAMES B. HOWE, HUGH A. TAIT, Attorneys for Defendant in Error.

## ARGUMENT ON MOTION TO DISMISS.

This action was begun by the plaintiffs in error against the defendant in error, Puget Sound Electric Railway, a corporation, and Puget Sound Traction, Light & Power Company, a corporation, jointly, to recover damages for the death of Doctor E. M. Rininger, the husband of Nellie M. and the father of Helen Dorothy Rininger, which was alleged to have been caused by the joint negligence of said defendants.

A trial was had before a jury in the District Court of the United States for the Western District of Washington, Northern Division, Honorable E. E. Cushman presiding.

At the conclusion of the evidence in chief offered in behalf of plaintiffs in error, the defendant Puget Sound Traction, Light & Power Company, which was sued jointly with the defendant in error, moved for a judgment of non-suit, which motion was granted. (Rec. 107.)

The trial of the cause thereafter proceeded as against defendant in error, and at the conclusion of all the evidence, and after both parties to said cause had rested, defendant in error, Puget Sound Electric Railway, moved for an instructed verdict in its favor, which motion was granted. (Rec. 243.)

Thereupon the following verdict was returned (Rec. 253):

"We, the jury in the above entitled cause, find for the defendants, being instructed by the court so to do.

> R. T. NOYES, Foreman."

Thereafter the following judgment was rendered and given upon said verdict (Rec. 254):

"This cause having come on regularly for trial upon the merits on the 11th day of February, 1914, before the court and a jury of twelve persons duly and regularly sworn and impaneled to try the same; Messrs. H. H. A. Hastings and Livingston B. Stedman appearing as attorneys for the plaintiff, and Messrs. James B. Howe and Hugh A. Tait appearing as attorneys for the defendants; and oral and documentary evidence having been offered and received in behalf of both the plaintiffs and the defendants; and the evidence having been closed and both parties having rested their respective sides of said cause; and the defendants, by their said attorneys, having at the close of all the evidence moved the court to instruct the jury to return a verdict against the plaintiffs and in favor of the defendants, upon the grounds that all the evidence failed to show any negligence on the part of the defendants, and affirmatively showed that the plaintiffs' decedent, Edmund M. Rininger, and his servant running and operating the automobile in which

said Edmund M. Rininger, deceased, was riding at the time of the accident complained of, were guilty of such contributory negligence as to bar a recovery; and the court having heard the arguments of respective counsel, and having instructed the jury to return a verdict in favor of the defendants and against the plaintiffs; and the jury, in accordance with such instructions, having thereupon returned such verdict, and having been thereupon discharged from further consideration of the case; and the court being fully advised in the premises; it is now, upon motion of the said attorneys for the said defendants,

ORDERED, ADJUDGED and DECREED that this action be and the same hereby is dismissed; that the defendant Puget Sound Electric Railway do have and recover of and from the plaintiffs its costs of suit herein, taxed at three hundred fifty-nine and 10-100 dollars (\$359.10); and that the defendant Puget Sound Traction, Light & Power Company do have and recover of and from said plaintiffs its costs of suit herein, taxed at twenty dollars (\$20); and that execution issue therefor.

To all of which the said plaintiffs, by their said attorneys, in open court, duly excepted; which exception is hereby allowed.

Done in open court this 27th day of February, 1914.

EDWARD E. CUSHMAN, Judge."

While it is true that the motion for non-suit in favor of Puget Sound Traction, Light & Power Company, which was sued jointly with defendant in error, Puget Sound Electric Railway, was orally granted by the court on the trial of the cause, the record does not disclose—and we apprehend counsel will not contend—that any formal or written judgment upon said motion was ever signed or rendered. The only judgment which was ever rendered or given in the cause is that which has just been quoted. The verdict was in favor of both defendants. The judgment entered upon the verdict was that the action be dismissed, not as against one defendant only, but as against both.

It cannot, we think, be seriously contended that the verdict is not a joint verdict in favor of both defendants, nor that the judgment rendered thereon is not a joint judgment.

The Puget Sound Traction, Light & Power Company, which was a defendant in the court below, is not named either in the writ of error (Rec. 284) or the citation (Rec. 286); defendant in error, Puget Sound Electric Railway, being alone named in the writ, and the citation, which runs to it only. The defendant Puget Sound Traction, Light & Power Company was never notified of any review sought to be had in this court of the judgment complained of, nor has it ever been given an opportunity to be heard in this court. Although a party defendant in the court below, and having obtained a verdict and judgment in its favor, which it is

manifestly interested in having affirmed, it is not brought before this court, and no opportunity has been afforded it to be heard in the protection of its rights. There is perhaps no rule more firmly established by the Federal courts than that requiring all parties having an interest in a joint judgment to be brought before the appellate court when such judgment is sought to be reviewed.

Masterson vs. Herndon, 10 Wall., 416.

Hardee vs. Wilson, 146 U. S., 179.

Davis vs. Mercantile Trust Co., 152 U. S., 590.

Wilson vs. Kiesel, 164 U. S., 248.

Garcia vs. Vela, 216 U. S., 598.

Illinois T. & S. Bank vs. Kilbourne, 76 Fed., 883.

Dodson vs. Fletcher, 78 Fed., 214.

Ayres vs. Polsdorfer, 105 Fed., 737.

Loveless vs. Ransom, 107 Fed., 626.

Holbrook, etc., Co. vs. Menard, 145 Fed., 498.

Lewis vs. Sittel, 165 Fed., 157.

Ibbs vs. Archer, 185 Fed., 37.

Lamon vs. Speer Hardware Co., 190 Fed., 734.

The cases of Masterson vs. Herndon (10 Wall., 416) and Hardee vs. Wilson (146 U. S., 179) are those most frequently cited, and appear to be the leading cases upon this point.

In the Masterson case, Mr. Justice Miller said: "It is the established doctrine of this court that in cases at law where the judgment is

joint, all the parties against whom it is rendered must join in the writ of error, and in chancery cases all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed."

The opinion in the Masterson case is quoted with approval, and the decision followed by Mr. Justice Shiras, in the Hardee case.

'The rule is firmly established, at least in the appellate courts of the United States, that where a judgment or decree is rendered against two or more jointly, all must join in suing out the writ of error or prosecuting an appeal, unless those who are not joined have been invited to come in and have refused, and proof that this has been done must be made to appear by the record of the Circuit Court before a writ or error or an appeal by less than the whole can be allowed."

'It is well settled in the jurisprudence of the United States courts, at least, that where there is a joint judgment or decree against several defendants, in a writ of error or an appeal from such decree, all the defendants must join, unless it be shown that against those not joining some proceeding in the nature of a summons in severance has been taken or that due notice has been served upon them by the defendant taking the appeal, and that such

defendants have refused to join therein; that this is a part of the substantive law of procedure and is founded upon both reason and authority, is well shown in the opinion of the Supreme Court in *Masterson vs. Herndon*, 10 Wall., 416."

We, therefore, submit that the Puget Sound Traction, Light & Power Company, having been sued jointly with the defendant in error, Puget Sound Electric Railway, and a joint verdict and a joint judgment in favor of these defendants in the court below having been returned and given, and the defendant Puget Sound Traction, Light & Power Company not having been made a party to these proceedings for review, and having been given no opportunity to defend the verdict and judgment in its favor, the writ of error should be dismissed.

## ARGUMENT ON THE MERITS.

At the time of this unfortunate accident, the defendant in error, Puget Sound Electric Railway, was operating an electric interurban line between the cities of Seattle and Tacoma in the State of Washington.

A few miles south of Seattle is a small station known as Allentown, and about two thousand feet south of the station mentioned is a small station known as Riverton. About half way between these points is a bridge over which the county road passes, which has been designated in the evidence as the Duwamish Bridge.

The accident occurred at Riverton, July 25th, 1912, at about four o'clock in the afternoon. The day was bright and clear (Rec. 59).

Riverton and the vicinity constitutes a small settlement, the houses being scattered and the land being divided into small acreage. (Rec. 37.) The railway of defendant in error at this point is double tracked, runs practically north and south, and for some distance north and south of Riverton is laid upon its own private right of way. (Rec. 167.)

The county road approaches the tracks from the west at a slight angle, so that one driving from the west toward the track would be traveling in substantially a northeasterly direction. Immediately after crossing the tracks, the county road turns sharply to the left, and in a northerly direction, following the side of the tracks about a thousand feet to the Riverton bridge, where it turns abruptly away from the tracks, and in an easterly direction, across the river. Looking from the crossing at Riverton in a northerly direction, the tracks follow the foot of a bluff on the westerly side thereof and make a gradual curve to the right or east. This bluff begins on the northerly side of the county road and westerly side of the tracks, gradually increasing in height toward the north. About three hundred feet west of the track the county road descends thereto on a slight grade of four per cent. until within thirty feet of the track, and from that point on and until reaching the track the road is level. (Rec. 110.)

At the time of the accident, and for some time prior thereto, defendant in error had erected and maintained an iron post, set a few feet west of its tracks and a few feet north of the county road, upon which was a gong about twelve inches in diameter, operated by electricity, five red electric lamps, and a sign in the form of a cross about six feet long reading "Railroad Crossing." (Rec. 114.)

On the right hand side of the county road, about three hundred feet west of the crossing, defendant in error had placed a sign reading "Caution. 300 feet to Railroad Crossing." On the same pole supporting the sign last referred to, was an automobile sign displaying a symbol to indicate the railroad crossing and the words "Danger, Railroad Crossing," both of which signs were in the position stated on the day of the accident. (Rec. 114.) About twelve hundred feet north of the crossing an electric appliance was placed by the side of the southbound track, and was so arranged that whenever a south-bound car would pass thereover, it would automatically start the electric gong at the crossing to ring, and cause the red lights on the post to which the sign was attached to burn, until the train passed over the crossing and came in contact with another electric appliance placed about twenty feet south of the crossing, which would cause the gong to cease ringing and the lights to cease to burn. A similar electric contrivance was placed by the side of the north-bound track about twelve hundred feet south of the crossing, and was so arranged that whenever

a north-bound train passed thereover it would likewise automatically start said gong to ringing and lights to burn, which condition would continue until the train had passed over the crossing and reached an electric contrivance placed about twenty feet north thereof.

The iron post to which the electric gong, electric lights and railroad crossing sign were attached was so located that a person driving toward the tracks from the west could see the same for a distance of at least three hundred feet. (Rec. 37.)

Doctor Rininger, for whose death this suit was brought to recover damages, was at the time of the accident riding in his own automobile driven by his own chauffeur. The steering wheel of the automobile was on the right hand side, and Doctor Rininger occupied the forward seat next and to the left of the chauffeur. Two ladies, one of whom was the Doctor's sister, occupied the rear seat. As the automobile approached the crossing from the west, a south-bound limited train, which made no stop thereat, was likewise approaching from the north. The train and automobile collided at the crossing, the forward right hand step of the train coming in contact with the forward right hand hanger or "goose neck" of the automobile, this "goose neck" being the most forward part of the machine and coming out nearly in line with the forward part of the front wheels. That the forward right hand step of the train came in contact with the forward right hand portion of the automobile, is explained

by the fact that the county road approaches the crossing in a slightly diagonal direction, and the automobile was pointed somewhat toward the approaching train. By reason of the impact, Doctor Rininger was thrown out of his automobile and under the train in such a way that his death must have been instantaneous.

At the conclusion of the evidence offered in chief by the plaintiffs in error, a motion for non-suit in behalf of Puget Sound Traction, Light & Power Company (one of the defendants in the court below) was interposed, upon the ground that it failed to appear that such defendant had anything to do with the operation of the trains of the defendant in error, Puget Sound Electric Railway, and was not shown to be in any way responsible for the happening of the accident. This motion was sustained without objection. The cause then proceeded as against the defendant in error, and at the conclusion of all the evidence offered on both sides, and after both sides had rested, a motion in behalf of defendant in error for an instructed verdict was made upon the grounds that there was no proof of negligence on the part of said defendant, and that all the evidence showed that Doctor Rininger and his chauffeur had been guilty of such contributory negligence as would bar a recovery. (Rec. 243.) The motion was sustained upon the latter ground. Since, however, the entire record is before this court for review, we take it that if the judgment can be sustained upon any ground, it will not be

reversed, and that if upon a consideration of all the evidence this court should be of the opinion that negligence on the part of the defendant in error had not been proven, the judgment must stand for that reason, as well as for the reason that all the evidence shows that Doctor Rininger and his chauffeur were guilty of negligence themselves.

The principal, and as we believe only, questions to be determined are, first, whether or not the record shows defendant in error to have been guilty of negligence, and if so, second, whether or not it shows Doctor Rininger and his chauffeur to have been guilty of contributory negligence. We will endeavor to discuss these questions in the order named.

## DEFENDANT IN ERROR WAS NOT GUILTY OF NEGLIGENCE.

The allegations of negligence on the part of defendant in error, and the acts of negligence sought to be proven, are that the motorman in charge of the train involved in the collision failed to blow any whistle, that the train was operated at a high and dangerous rate of speed, and that no watchman was kept at the crossing to warn drivers of vehicles of approaching trains. It is not disputed that the tracks of defendant in error for some distance north and south of the crossing were laid upon its own private right of way, over which it undoubtedly had lawful authority to operate its trains at such rate of speed as it saw fit, so long as it did not en-

danger the safety of its passengers. It is also practically conceded that as the train involved in the accident was approaching the crossing at Riverton, and before the motorman saw the automobile in which Doctor Rininger was riding, it was running at a rate of speed of not over thirty to thirty-five miles an hour. This was a through train from Seattle to Tacoma, making no stop at Riverton, and it cannot, we submit, be successfully contended that for such a train a speed of from thirty to thirty-five miles per hour running through a country district is, as a matter of law, dangerous or excessive.

Parkerson vs. Railway Co. (Ky.), 80 S. W., 468.

Baltimore etc. Co. vs. State (Md.), 69 Atl., 439, 446-7.

Freedman vs. Railway Co. (Conn.), 71 Atl., 901, 904.

Burge vs. Railway Co. (Mo.), 140 S. W., 925. Dyson vs. Railway Co. (Conn.), 17 Atl., 137.

Keiser vs. Railway Co. (Pa.), 61 Atl., 903.

Dubois vs. Railway Co., 34 N. Y. S., 279.

Custer vs. Railway Co. (Pa.), 55 Atl., 1130.

In Keiser vs. Railway Co. (61 Atl. 903), which was a crossing accident, the court says:

"The exact rate of speed shown by the schedule and fixed by the train record made by the conductor at the time, showed the rate of speed to be a little over thirty-five miles an hour. It was a fast passenger train, with two locomo-

tives, and this rate of speed is not excessive for such a train. It is clear, therefore, that the appellant failed to establish her allegations of negligence that the train was running at an unusual time or at an excessive rate of speed."

In *Dubois vs. Railway Co.* (34 N. Y. S., 279), it appears that plaintiff's intestate was struck and killed by a steam train while attempting to cross the tracks of the railway upon a public highway in the town of Gates, the court saying:

"This was a rural section of the country, and the fact that the colliding train was running at the rate of fifty-five or sixty miles an hour, was not in itself negligence on the part of the defendant."

In Custer vs. Railway Co. (55 Atl., 1130), the court announces the rule:

"There is no limit to the rate of speed at which a railroad company may run its trains over the open country and over crossings of country roads, so long as the bounds of safety to patrons are not transgressed, Reading &c R. Co. vs. Ritchie, 102 Pa., 425; Newhard vs. Penna. Co., 153 Pa., 417."

It is nowhere, so far as we know, held that either electric interurban or steam railway trains must be held under such control that they can be stopped before passing over every country road crossing in time to avoid a collision with a vehicle thereon, where such vehicle suddenly emerges from behind an embankment or other obstruction to the view of

the motorman or engineer, as was shown to be the fact in this case.

The Supreme Court of this state has applied the rule to the operation of street cars in populous cities, and has held that the law imposes no duty upon the motorman of such cars to at all times have the same under such control as will surely prevent accidents at street intersections. If this rule can be applied to the operation of street cars in cities, with what greater force must it be applied to the operation of electric interurban lines running through country districts.

Christensen vs. Union Trunk Line, 6 Wash., 75.

Skinner vs. Tacoma R. P. Co., 46 Wash., 122.

In the Christensen case (p. 79) it is said:

"And he was not bound to regulate his speed at such a rate as would certainly avoid injury to anyone who might attempt to cross the road in an unreasonable and improper manner. Meyer vs. Lindell Ry. Co., 6 Mo. App., 27."

In the Skinner case (p. 125) the court says:

"If the motorman sees a clear track and has no occasion to stop and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed even over a crossing."

Counsel for plaintiffs in error devote a considerable part of their brief to the argument that the chauffeur could not see a south-bound train approaching until he got very near to the crossing.

This argument is certainly a two-edged sword, for the reason that it would be impossible for the motorman of the train to have seen the automobile one moment sooner than the chauffeur of the automobile could have seen the approaching train.

The evidence shows that the automobile weighed, exclusive of its passengers, something less than 5000 pounds (Rec. 46), while the single coach, which has been designated in the record as "the train", was  $55\frac{1}{2}$  feet long and weighed 43 tons, exclusive of the forty passengers aboard (Rec. 212).

Kent Brodnix, Doctor Rininger's chauffeur, and who was driving his automobile at the time, testified that he was within from twenty-five to thirty feet of the track when he first saw the electric car, at which time he thought the car was not more than 100 to 150 feet away (Rec. 54).

D. M. Dingwall testified that for over eleven years he had been a motorman for defendant in error, running passenger coaches between Seattle and Tacoma, and that in his opinion, judging from his experience as such motorman, a single coach running at thirty-five miles an hour approaching the Riverton crossing, could not be stopped by making an emergency application of the brakes—assuming that the rail and all other conditions were most favorable—within less than from 350 to 400 feet (Rec. 182).

Eugene C. Sanford testified that for the past eight years he had been in the employ of defendant in error as a motorman, operating both freight and passenger trains; that he was familiar with the tracks north of Riverton; that in his opinion a train approaching Riverton at thirty-five miles an hour could not be stopped within less than 350 to 400 feet, and if running at thirty miles an hour, it could not be stopped within less than 300 to 350 feet (Rec. 184).

- F. J. Dunn testified that he had been a motorman for defendant in error for eleven years, running passenger trains; that he was familiar with the Riverton crossing, having passed over it twice a day for the last year, and six times a day for the preceding six years; that a south-bound single coach train approaching this crossing at the rate of thirty-five miles an hour, all conditions being most advantageous for making a good stop, could not be brought to a standstill within less than from 350 to 400 feet, and if such train were running thirty miles an hour, 300 feet would be a good stop (Rec. 185).
- R. W. Robson, the motorman of the train involved in the collision, testified that he had been a motorman for defendant in error for three years; that prior to that time he had worked two years for the Spokane Inland Railway, operating electric and steam locomotives; that he had fired for nine years on the Chicago & Alton Railway, a steam road, and had run an engine about seventeen months on the Oregon Short Line; that he did not see the automobile until he got to within from 50 to 80 feet of the crossing, at which time he was running

about thirty to thirty-five miles an hour; that from his experience as a motorman, a good emergency stop for an electric coach running thirty-five miles an hour would be from 350 to 400 feet, and that he actually stopped in about 300 feet (Rec. 210-212).

This testimony stands uncontroverted. Plaintiffs in error offered no proof to show that the train could have been stopped in less distance than it actually was, or that it could have been stopped in time to avoid the collision after the automobile came in sight of the motorman. Therefore, we submit, that so far as the rate of speed at which the train was running is concerned, defendant in error cannot be held guilty of negligence, unless it be held as a matter of law that the motorman must at his peril in every instance stop his train at every road crossing in time to avoid a collision, irrespective of surrounding conditions and irrespective of the rate of speed at which the drivers of vehicles upon county roads approach the track. In other words, we respectfully submit that before defendant in error can be held liable on the ground that it was operating its train at a dangerous rate of speed, the novel doctrine must be indulged in that a railroad company is an insurer against accident to travelers in vehicles at railroad crossings.

The next ground of negligence that plaintiffs in error contend for, is that defendant in error failed to keep a watchman at the crossing. We do not understand that the law imposes upon railways the imperative duty of keeping watchmen or flagmen

at road crossings, or that there is any rule of law which makes it negligence per se to fail to keep a watchman or flagman. The only duty imposed, if we correctly understand the rule, is that railroads must use such reasonable care to avoid accidents at crossings, as an ordinarily careful and prudent person would under all the circumstances and conditions exercise. The old rule declaring it to be a question for the jury as to whether or not, under certain circumstances, it was negligence on the part of a railway to fail to maintain a flagman at road crossings, was adopted long before the application of electricity as a motive power for interurban lines, and long before the invention or application of electrically given danger signals. The substance of the rule is only that reasonable care on the part of the railway shall be exercised, and if automatic electrical devices for giving notice to travelers upon highways of the approach of trains have been perfected and installed, it cannot, we submit, be successfully contended that in addition thereto, a flagman must be stationed. As we have already shown, the electric gong, with red electric lights in connection therewith, installed and maintained at the crossing in question by defendant in error, is operated automatically by a train approaching the crossing in either direction, when such train is 1200 feet distant from the crossing. Being a mechanical and automatic contrivance, it is safer and more dependable than a flagman or watchman could be, for the reason that the element of human frailty-inatten-

tion, mistake and carelessness—is eliminated. This electric gong, as the undisputed evidence shows, is twelve inches in diameter, and, as counsel admit in their brief, under ordinary circumstances can be heard ringing for a distance of from 700 to 800 feet from the crossing. Crossed sign boards six feet in length, reading "Railroad Crossing", were placed upon the same post supporting the gong, and 300 feet west of the crossing—that being the direction from which Doctor Rininger was approaching-are two sign boards, one placed by defendant in error reading "Caution. 300 Feet to Railroad Crossing", and the other, an automobile sign, reading "Danger. Railroad Crossing" (Rec. 113-114). As before stated, this electric gong would be "cut in" by a south-bound train when it reached a point approximately 1200 feet north of the crossing, and would continue to ring until such train passed over the "cut out" located about twenty feet south of the crossing. It would also be "cut in" by a northbound train at a point approximately 1200 feet south of the crossing, and continue to ring until such train passed the "cut out" located about twenty feet north of the crossing. If a south-bound train should stop at any point north of the crossing, the bell would continue to ring until such train passed over the "cut out" on the south side of the crossing, or until a north-bound train should pass over the "cut out" on the north side of the crossing.

Plaintiffs in error attempted to prove that the south-bound limited with which the automobile

came in collision, did not start the electric gong to ringing as it passed over the "cut in" north of the crossing. In making this attempt, they placed upon the stand the following witnesses: Kent Brodnix, Mrs. Roria Springer, Trena Brock, Elora Lamb, and Mrs. Olive R. Lyford, Doctor Rininger's sister. Mr. Brodnix, the chauffeur, upon his direct examination was asked:

"Q. At that time as you were approaching, or at the time you saw the electric car approaching, was the electrical alarm ringing?

A. Not that I heard." (Rec. 44-45.)

On cross-examination he testified:

"As to hearing the electric gong ringing at any time before the accident, I could not say absolutely positive, but I don't remember hearing it." (Rec. 56.)

He also admitted that a coroner's inquest was held the day following the accident, at which he testified as follows:

- "Q. There is a gong there, is there not, on the railroad?
  - A. Yes sir, there is a gong there.
  - Q. Was the gong ringing?
- A. I did not hear it until I was within about fifteen feet of the track; was the first I heard the gong."

Continuing, upon the trial he testified:

"Q. Did you or did you not testify in substance and effect as I have just read to you?

- A. I think I gave that, yes sir.
- Q. Now in giving that testimony you were testifying the day after the accident, were you not?

## A. Yes sir." (Rec. 56.)

Counsel have suggested that the gong which was heard ringing was one upon the train, and not the electric danger signal gong by the roadside. That the gong Mr. Brodnix had reference to at the time of testifying at the inquest was the electric danger signal gong, is conclusively shown by the following additional testimony he admitted he gave at the inquest:

- "Q. Where is the gong located with reference to the crossing?
- A. It was on the left hand side going this way (north).
  - Q. Right at the crossing?
  - A. It is right by, next to the bluff.
  - Q. What kind of a gong is it?
- A. I did not look at it especially. It is a regular signal gong." (Rec. 58.)

It will be remembered that the accident occurred July 25th, 1912, and that the trial of the cause was not begun until February 11th, 1914, more than a year and a half thereafter. The memory of Mr. Brodnix when he testified before the coroner's inquest the day after the accident, admitting that he heard the electric gong when he got to within fifteen feet of the track, must have been clearer and more reliable than was his memory a year and a

half later, when he testified upon the trial in substance that he did not recollect hearing it.

Mrs. Springer testified that at the time of the accident, she was about fifteen feet west of the platform, meaning the platform leading from the county road to Rosenberg's store. It is shown by actual measurement that the distance from the westerly edge of this platform to the first rail of the south-bound track is ninety feet. (Rec. 109.) She further testified on direct examination:

- "Q. I will ask you to state whether or not that gong was ringing at the time of this accident?
- A. I did not hear it. I did hear it ring sometime after; that is when the next car came along." (Rec. 64.)

Trena Brock, a girl thirteen years old, testified on direct examination that at the time of the accident she was with Mrs. Springer, and that "I did not hear the electric gong. I know about the electric gong that is near the crossing and that it rings usually when trains come along, but I did not hear it ring at that time."

On cross-examination she testified:

"I had lived there before this accident about a year and a half and had become pretty well used to hearing the electric bell ringing, and I got so that I did not pay any attention to it, so that when this train that struck the automobile came along it may have been ringing without my paying any attention to it.

- Q. You do not know of your own knowledge that it was ringing or not ringing?
- A. I did not hear it and I usually listen for it.
- Q. You were not listening to see whether it rang, were you?
  - A. No sir." (Rec. 74-75.)

Elora Lamb testified on direct examination that at the time of the accident he was standing on the passenger platform on the east side of the tracks waiting for a north-bound train, and that "the electric gong maintained at the crossing did not ring at that time." (Rec. 90.) He also stated that he is a chauffeur himself, knew Mr. Brodnix, and that they were quite friendly. (Rec. 91-92.)

Mr. Lamb was afterward recalled for the purpose of proving that at other times prior to the accident the electric gong failed to ring upon the approach of trains. The only specific instance he was able to give was an occasion about two months before the accident, when he was in the little waiting room on the east side of the tracks, about eleven P. M., waiting for a north-bound train. On crossexamination, he admitted that the door of the little waiting room was open; that the platform upon which the waiting room is constructed is about twelve feet wide, and that the north-bound trains pass right by it; that he missed the train he was waiting for, for the reason that he did not hear it until it got past, and that when the train got as close to where he was standing as the distance from

there was to the electric bell across the tracks, the train would make as much noise as the bell and would drown out the sound of the bell. (Rec. 228.)

If Mr. Lamb was so inattentive that he failed to hear the rumble and noise of the approaching train it was his purpose to take until after it passed the platform, or if his hearing was so poor that it did not apprise him of the approach of the train, certainly but little weight can be given to his statement that the bell did not ring at the time of the accident.

Mrs. Lyford, who was Doctor Rininger's sister, and in the automobile with him, testified upon direct examination that she "heard no signals whatever from the gong ringing." (Rec. 94.) Upon cross-examination she testified:

"Miss Davis and I kept up the conversation until the train came in view. \* \* \* Perhaps the electric bell might have been ringing without my being conscious of it." (Rec. 96.)

The foregoing negative testimony was met by defendant in error by the affirmative testimony of Mrs. Amelia Nelson, Harry Summerfield, J. C. Rosenberg, Archie Apt, Isaac Gribben, A. L. Brown, F. J. Dunn, G. E. Herpick, Ralph Bressler and R. W. Robson.

Mrs. Nelson testified that she was a passenger on the train involved in the accident, seated in the forward end of the car on the right hand side (being the side on which the electric bell was located) next to an open window; that as the train approached the crossing, the electric bell rang quite close to the car, and for an instant it startled her and she moved a little way from the window. (Rec. 118.)

Mr. Summerfield testified that he was Superintendent of the Poor Farm of Pierce County; was a passenger on the train involved in the accident; was seated in the rear seat on the right hand side, and that "as our train passed over the roadway, the electric bell at the crossing was ringing; I noticed that very distinctly." (Rec. 135.)

Mr. Rosenberg testified that he was standing about seventy feet west of the track talking to Mrs. Springer (Rec. 141); that "as the automobile was approaching the railroad track the electric alarm was ringing."

"Q. How far away from the railroad track was the automobile when you first noticed the electric alarm bell?

A. I hardly know how to answer that, Mr. Tait, because I knew at the time of the train approaching that the bell was ringing, and how far the automobile was from the track when I first noticed it, it is hard for me to indicate, but I heard the bell ringing while I was talking to Mrs. Springer; I heard the bell ringing before the auto passed." (Rec. 144-145.)

Mr. Apt testified that he was a passenger on the train; was seated in the second seat from the front on the right hand side next to an open window; that as the train passed over the crossing at Riverton, the electric danger bell was ringing (Rec. 192);

that the train ran about 250 feet after striking the automobile; that he got off the train, went back to the crossing, and when he got there the electric bell was not ringing; that he stayed at the crossing about fifteen minutes, when the south-bound local pulled in, which started the bell to ringing, and it continued to ring until the north-bound limited from Tacoma came, which latter train stopped the bell upon passing over the crossing. (Rec. 194.)

Mr. Gribben testified that he was the conductor of the train involved in the accident; that the electric gong was ringing when his train passed over the crossing; that it ceased to ring after his train passed over the cut out just south of the crossing, but that it started to ring again when the south-bound local pulled up some fifteen minutes afterward, and that the bell again ceased to ring when the north-bound limited from Tacoma passed over the cut out on the north side of the crossing. (Rec. 218-219.)

Mr. Brown testified that he was a passenger on the train involved in the accident; that while he was not positive, he thought the electric gong was ringing as the train passed over the crossing; that he got off the train and went back; was on the ground when the local came in, and as it came in the electric bell was ringing and rang while it was there; that the local stopped 50 or 60 feet north of the crossing and the bell rang until it got off the track. (Rec. 131.)

Mr. Dunn testified that he was motorman of the

local train following behind that which collided with the automobile, and reached Riverton twelve or fifteen minutes after the accident; that when his train got there, the limited was about 200 feet south of the crossing; that his train stopped on the north side of the crossing; that the electric gong was ringing when his train reached Riverton and continued to ring until the north-bound limited passed over the crossing. (Rec. 186.)

Mr. Herpick testified that at the time of the trial he was a moving picture operator, but that at the time of the accident he was in the employ of defendant in error as a collector, and was riding upon the train involved in the accident; that he got off the train and went back to the crossing; that he was at the crossing when the south-bound local pulled in, and the bell was ringing as it came in, and continued to ring until it was cut out by the northbound limited just a little north of the crossing (Rec. 201); that he is familiar in a general way with the operation of these electric gongs; that when he got off the train and went back to the crossing, the bell was not ringing, having been cut out by the train upon which he was riding, and that it remained silent until it was cut in again by the south-bound local, which started it to ringing. (Rec. 202.)

Mr. Bressler testified that he was conductor of the north-bound limited which arrived twenty or twenty-five minutes after the accident; that his train was flagged and stopped on the south side of the county road; that he went out to see what the trouble was and was told that there had been an accident; that the gong on the west side of the track was then ringing; that his train remained on the south side of the road for probably half a minute and then crossed over on the north side so as to cut out the electric bell. (Rec. 208.)

Mr. Robson testified that he was motorman on the train involved in the accident; that when his train came to a stop, it had passed the cut out on the south side of the crossing, and when he got back there, the electric gong was not ringing, but began to ring when the south-bound local came in fifteen or twenty minutes later, and that it continued to ring until the north-bound limited afterward cut it out by pulling across to the north side of the county road. (Rec. 212.)

Scott Malone, a witness for plaintiffs in error, testified on cross-examination that he was a deputy sheriff, and reached the scene of the accident within an hour after it occurred; that he stayed there quite a while; that while he was there trains came from the north and probably one from the south, and that as these trains approached the crossing, the electric bell began to ring. (Rec. 71.)

Mr. Brodnix (the chauffeur) testified on re-direct examination:

"I now state that after the accident I heard the electric danger signal ringing the gong. I stayed down there some little time before I came to the City of Seattle. I do not know how long after the accident, but there was a train came down from Seattle on the south-bound track to Riverton and stopped there for some time. I would not think it was as long as fifteen or twenty minutes, but I do not know and could not say whether the signal gong was ringing all the time that this second train was there or not, but it did ring part of the time." (Rec. 62-63.)

Isaac N. East (a witness who perhaps showed more bias in favor of plaintiffs in error than any other they placed upon the stand) testified upon cross-examination:

"The two-coach passenger train came up about twenty minutes later (meaning after the accident) from the north, and as it came up the electric bell started ringing. It started ringing some time after the accident." (Rec. 86.)

When it is recalled that the danger signal gong is operated automatically by the passing of trains over the tracks, that a south-bound local train followed but a few minutes behind the south-bound limited train which again started the gong to ring, and that it continued to ring until a north-bound limited cut out the bell twenty-five or thirty minutes after the accident by passing over the "cut out" on the north side of the county road, and that no evidence was offered to show that any repairs had been made to the bell, or the automatic appliances by which it was operated, between the time of the

accident and the arrival of the south-bound local or the north-bound limited, it seems incredible that the minds of reasonable men could differ upon the fact that the electric gong was caused to begin to ring when the south-bound limited passed over the "cut in" 1200 feet north of the crossing. That the electric gong was in proper working order is not only conclusively shown by the affirmative testimony of disinterested witnesses for defendant in error, but is shown as well by the members of the several train crews whose duty it was to observe The testimony of the conductor of the the fact. north-bound limited, which was flagged at the crossing twenty-five or thirty minutes after the accident, to the effect that when his train reached the crossing it stopped on the south side thereof, that the bell was then ringing as the result of the southbound local which followed a few minutes behind the train involved in the accident passing over the "cut in," and that in order to stop the ringing of the bell he moved his train across the "cut out" on the north side of the road, is so convincing that all doubt is removed. In addition to this, at least three witnesses for plaintiffs in error admitted that the approach of the south-bound local train set the ball into operation. It cannot be argued that there was any defect in the appliance upon the south-bound limited, for the reason that it cut out the bell upon passing over the crossing. Neither can it be argued that there was any defect in the "cut in" appliance north of the track, for the reason that it was set in

operation by the passage thereover of the southbound local.

The remaining ground of negligence contended for by plaintiffs in error is that the approaching train blew no warning whistle as it neared the crossing. We will not go into this feature of the case as fully as we did that respecting the ringing of the electric bell, but will content ourselves with a brief reference to the testimony.

In behalf of plaintiffs in error:

Mr. Brodnix testified: "I did not hear any whistle or the ringing of any bell on the car." (Rec. 44.)

Mrs. Springer testified: "I was talking with Mr. Rosenberg and I was facing the store and my side was toward the crossing and I was engaged in conversation with him at the time the collision occurred. I was not paying any attention to either the electric bell or the whistle of the train.

- Q. You do not wish to have the jury understand that you are swearing unqualifiedly, do you, that no whistles were blown?
  - A. Well, I said I did not hear them.
- Q. You did not hear it, that is all you know about it?
  - A. Yes sir." (Rec. 66.)

Trena Brock testified: "I heard no whistles from the train that was coming south." (Rec. 74.)

And on cross-examination said:

"Q. Now all you know about it is that if the whistles on that train blew, you do not recollect hearing them?

A. No sir; it may have blown without my hearing it." (Rec. 75.)

Mr. East testified: "I did not hear any whistles from the approaching car. I was right there on the road." (Rec. 79.)

Mr. Lamb testified: "I did not hear any whistles blown on the train and I was watching it all the time. I am sure I could have heard the whistles if any had been blown on this train." (Rec. 90.)

It will be recalled that Mr. Lamb is the young gentleman who admitted that while waiting to take passage on a north-bound train at the same station he did not hear it until it had passed him.

Mrs. Lyford testified: "I heard no whistles from the approaching train." (Rec. 94.)

And on cross-examination said: "It is possible that the train may have blown a whistle a quarter of a mile or a half a mile up the track and I did not hear it." (Rec. 96.)

The following affirmative testimony was given in behalf of defendant in error:

Mr. Overlock, a passenger on the train, testified: "I recall that the crossing whistle was blown before the train reached the Riverton crossing; it was blown just after we left Allentown. Allentown is, I should think, about 1000 or 1200 feet from Riverton. The whistle signal

that was blown was two long and two short blasts, regular crossing whistle." (Rec. 120-121.)

Mr. Brown, a passenger, testified: "The crossing signal was blown before we reached Riverton.

- Q. At about what point?
- A. After passing the rock quarry.
- Q. And that would be how far north of the Riverton crossing?
- A. I never measured it, but it is only a few minutes' ride, just a short distance, should say a quarter of a mile." (Rec. 131.)

Mr. Summerfield, a passenger, testified: "I heard the road crossing signal just a minute or so before the accident happened and then immediately prior to the accident. The first signal was four blasts. I would not want to state the exact distance north of the crossing I heard it. We were north of the Riverton crossing when I heard it a very short time, a minute or so before we reached Riverton." (Rec. 135.)

Mr. Rosenberg, who was standing by the side of the county road a little over ninety feet west of the track, testified: "I heard an approaching train and heard the whistle and the rumbling of the train. The last whistle that I heard was four blasts, the regular crossing whistles that railroads always give, two long, a short, and a long one." (Rec. 143.)

Mr. Apt, a passenger, testified: "As we approached Riverton there were two long and two short blasts blown about where the county bridge crosses the river at Riverton. I should judge this bridge is 300 yards north of the crossing." (Rec. 192.)

Mr. Herpick, who was riding upon the train, testified: "As the train was approaching Riverton, there were two long and two short blasts of the whistle blown just after we left Allentown, which is the regular road crossing signal. I heard other whistles afterward just a second before we hit the crossing. There were three or four short blasts of the whistle." (Rec. 200.)

Mr. Robson, motorman of the train involved in the accident, testified: "As I was approaching the Riverton crossing, I whistled the crossing whistle shortly after leaving Allentown. This whistle consisted of two long and two short blasts, and was perhaps 800 or 900 feet from and approaching the Riverton crossing." (Rec. 210.)

Mr. Gribben, who was conductor in charge of the train involved in the accident, testified: "I remember that there was the regular road signal given by the motorman before reaching the Riverton crossing, consisting of two long and two short whistles, and I think the train was a little past Allentown, which is in the neighborhood of 3000 feet north of there." (Rec. 218.)

It will, therefore, be seen that the allegation that the electric danger signal gong did not operate as the south-bound limited approached the crossing, and that no warning whistles were blown by the train mentioned, is supported only by the negative evidence of witnesses who testified merely that they "did not hear it," while the fact that the electric gong did ring, and the regular road crossing whistles were given, is conclusively shown by the affirmative testimony of witnesses who heard these signals, many of whom gave convincing reasons as to why the fact that the signals were given was impressed upon their memory. Counsel contend that what they designate as "conflicting evidence" upon these points, necessitated the submission of the question to the jury. So far at least as the allegation of negligence on the part of defendant in error is concerned, we readily concede that in many cases where a fact is affirmed on one side and denied on the other, it must be left to the jury to determine what the truth is; but the rule is well established in cases of this character that where the contention is made that a whistle was not blown or a bell was not rung, and such contention is supported only by the negative testimony of witnesses to the effect that they "did not hear" such whistle or bell, and the fact that such whistle or bell was blown or rung is shown by the affirmative testimony of witnesses to the effect that they heard it, and especially where it is the duty of one or more such witnesses to listen for such signals and ascertain the fact, the negative

testimony must give way to the positive, and no question is presented for the determination of the jury.

Long vs. McCabe, et al., 52 Wash. 422-430. Holland vs. Northern Pacific R. Co., 55 Wash. 266-269.

Lee vs. Railway Co. (Minn.), 70 N. W. 857.

Knox vs. Railway Co. (Pa.),, 52 Atl. 90.

Clark vs. Railway Co., 40 N. Y. S., 730.

Keiser vs. Railway Co. (Pa.), 61 Atl. 903.

Culhane vs. Railway Co., 60 N. Y., 133-137.

Horn vs. Railway Co. (C. C. A. 6th Ct.), 54

Fed. 301, 305.

In the case of *Long vs. McCabe, et al.*, (52 Wash. 422) commencing at the bottom of page 430, the Court says:

"In other words, as against a motion for a judgment at the close of plaintiff's case and renewed at the close of all the evidence, a prima facie showing is to be determined as a matter of law by the Court in the light of the explanations made by the defendant. The duty of measuring the evidence not as to its weight but its legal effect, is put upon the Court. What may have been evidence prima facie may not be so when rebutted by other evidence. The negative testimony must give way to the positive evidence."

In Holland vs. Northern Pacific R. Co. (55 Wash. 266), commencing at the bottom of page 269, the following language is used:

"The statements of a person who testifies that he did not hear a bell ring or a whistle blow, where he is a mere passer by without object or purpose in ascertaining the fact, is never sattisfactory evidence even under favorable circumstances, and it is entirely too much to say that the statement of this witness that he did not hear the whistle under the circumstances shown, is proof of the fact that it was not blown."

In Keiser vs. Railway Co. (61 Atl. 903) the Court says:

"The appellant undertook to show that the whistle was not blown nor the bell rung. Nine witnesses testified that they did not hear the bell ring nor the whistle blow. The testimony of all these witnesses was negative in character, and cannot prevail against the positive and conclusive testimony of the appellee, which clearly showed these duties to have been performed. This case comes under the rule stated by Mr. Justice Paxson in Urias v. Pennsylvania Railroad Company, 152 Pa. 326, 25 Atl. 566, wherein it is said: 'One witness who hears the ringing of a bell is worth more than the testimony of a dozen witnesses who did not hear it, unless in some manner their attention had been especially called to it. The witness who heard the bell either tells the truth, or he tells a deliberate and willful falsehood, while the witness who did not hear the bell may be, and probably is, truthful. The bell may be rung or the whistle blown without attracting the attention of the persons who are familiar with such sounds.''

In Culhane vs. Railway Co. (60 N. Y. 133), at page 137, the Court thus announces the rule:

"It is proved by the positive oath of the two individuals on the engine, one of whom rang it, and by two others who witnessed the occurrence and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal. The judge in his charge says they listened, but the statement is not borne out by the evidence. As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere 'I did not hear' is entitled to no weight in the presence of the affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact."

In the case of *Horn vs. Railway Co.* [(C. C. A. 6th Ct.), 54 Fed. 301], at page 305, the Court says:

"In the very nature of things their affirmative testimony that the warning was given (referring to the blowing of a whistle as a train approached a crossing) must be accepted as proof of that fact, notwithstanding an equal or greater number of witnesses failed to notice it from whatever cause. There is in such cases no conflict of evidence as to the matter in question. The observation of the fact by some is entirely consistent with the failure of others to observe it, or their forgetfulness of its occurrence. Stitt vs. Huidekopers, 17 Wall. 393."

## DOCTOR RININGER AND HIS CHAUFFEUR WERE GUILTY OF CONTRIBUTORY NEGLIGENCE.

Judge Cushman directed a verdict in favor of the defendant below upon the ground that all of the evidence showed that Doctor Rininger and his chauffeur approached the railroad crossing in such a careless and negligent manner and with so little regard for their own safety, that, as a matter of law, plaintiffs in error could not recover.

It will be remembered that Doctor Rininger was driving toward the tracks from the west and going in a somewhat northeasterly direction, and that beginning a short distance from the north side of the road and on and very close to the west side of the tracks, a bluff began to rise, which increased in height as it extended northward; that north of the crossing the tracks followed the foot of the bluff curving somewhat to the east; that about 2,000 feet north of the crossing is a small station known as Allentown; that owing to the curve of the bluff and of the tracks at its base, there is a point on the county road to the west of the tracks where one could see a south-bound train at Allentown, but which, owing to the curve of the bluff and tracks, would for a short distance pass out of sight behind the bluff and would again come into view before reaching the crossing at Riverton. Just how far west of the tracks this point is, the evidence does not definitely show, but it does appear that it is some distance further back from the tracks than the automobile was at the time Mr. Brodnix, the chauffeur, looked to the north and saw the train approaching.

According to Mr. Brodnix's own version of how the accident occurred, he was within twenty-five or thirty feet of the track when he first saw the train, at which time he admits that he was running at the rate of twelve miles an hour. He says that he immediately applied his brakes with such force as to lock the two rear wheels, and that the automobile skidded to a point so near the track that the extreme front end of the automobile was struck by the overhang of the car.

Since this Court cannot determine the question of contributory negligence without being in possession of all of the facts, we are compelled to refer to the evidence somewhat in detail.

Mr. Brodnix testified that for seven years he had been an automobile driver and repair man; that at the time of the accident and for three months prior thereto, he had been in Doctor Rininger's employ as a chauffeur; that to a certain extent he was familiar with the Riverton crossing (Rec. 43); that when he got to the top of the grade, about 300 feet from the crossing, he released the engine from the machine and coasted down the grade, using the brake to control the machine; that at the time he was going fifteen or sixteen miles an hour; that when he got to the store (meaning Rosenberg's) he looked in both directions and saw no train; that he "let the machine come on down," again looked south and then looked north, at which time the train was only a short distance from the crossing; that before this, he had "made an effort to listen" for approaching cars; that Doctor Rininger looked both ways and gave him a signal to go ahead (Rec. 44); that he was within from twenty-five to thirty feet of the track when he first saw the train and immediately set the brakes, causing both rear wheels to skid; that when he first saw the train it was from one hundred to one hundred and fifty feet away (Rec. 45); that "as we approached the crossing we were going at a speed I should judge of about fifteen miles an hour, not to exceed that. Ordinarily I could bring this automobile to a standstill when

proceeding at that rate under similar conditions in about twenty-five feet." (Rec. 47.)

- "Q. Is there any point on or near the crossing where you could see an approaching south-bound car all the time after it leaves the Allentown station?
  - A. Yes.
  - Q. Whereabouts is that?
- A. I should judge 25 or 35 feet from the track." (Rec. 48.)

That when he disengaged his clutch, Doctor Rininger was seated beside him and to his left in the front seat, was turned somewhat sideways, with his face towards the south talking to the ladies in the back seat; that he (Doctor Rininger) afterward turned around and looked to the north, after which Brodnix thought he turned back toward the ladies; that when Doctor Rininger looked toward the north, the automobile was 50 or 60 feet from the track (Rec. 49-50); that he had been driving automobiles in King County six or seven months before the accident, and had passed over the crossing six or seven times during that period (Rec. 51); and that he knew the tracks were there and that the bluff was there (Rec. 52).

## He further testified:

"I should judge I was about 25 feet—from 25 to 30 feet—from the track when I first saw the train. I had looked to the south just prior to that time and had looked to the north

possibly 30 feet farther back, so that I should judge that the last time I looked toward the north I must have been about 55 feet from the track and saw no train. When I first saw the train I could not say exactly how far it was from the crossing, but I should judge about 100 feet, but I could not say positively, and when I first saw the train I saw it across the point of that bluff on the left hand side of the county road, and I was looking directly north or up the track in a northerly direction at the moment the train came into view from around the bluff. I saw the train just as soon as it emerged from behind the point of the bluff. At that time we were running our automobile at about 12 miles an hour.

- Q. Well, I understood you to say this morning that you were running at fifteen or sixteen miles an hour.
- A. Well, right at that time I was not running as fast as I had coming down the hill. (Continuing.) I was running from 15 to 16 miles an hour as far back, possibly, as 100 feet from the track, but when I saw the train coming, I should judge that I was not running to exceed 12 miles an hour, and we were then within 25 feet of the track.
- Q. And at 12 miles an hour, within what distance do you think you could have stopped your machine?

A. Well, I don't know—I know I stopped it, that is all I know.

Q. It took you 25 feet to stop it, didn't it?

A. I should judge it was close to 25 feet. (Continuing.) I first saw the train when I was within 25 feet of the track and then applied the brakes so hard that it skidded the rear wheels and the machine moved forward until the front end of the automobile was so close to the rails that the overhang of the electric car struck it. The front wheels did not cross the rails of the track, but stopped just before we got to the rail. We stopped about close enough so that the body of the car hit us. I think that our wheels skidded the entire 25 feet on the ground, or that distance, whether it was 25 feet or not I cannot say. The rear wheels skidded from the time that I set the brakes. It was the goose-neck of the automobile that was hit. That is the part of the frame that holds the front spring." (Rec. 52 to 54.)

That this goose-neck is the most forward portion of the automobile and goes out nearly even with the front edge of the wheels; that it was the forward right hand corner of the electric car which struck the automobile; that throwing out the clutch on the automobile disconnects the engine from the rear axle, but does not stop the engine, which continues to run, and makes about as much noise as it does while the clutch is connected, so that so far as the noise of the engine is concerned, it made no

difference whatever whether he threw out the clutch or left the engine connected; that he could not describe the amount of noise the engine made, but it made quite a little bit (Rec. 54-55); and that if he had stopped the engine, it is possible he could have heard a little better.

Mr. Brodnix admitted that when testifying at the coroner's inquest the day after the accident, he made the following answer to the following question:

- "Q. How fast were you driving as you approached that track?
- A. I don't think I was traveling over 15 miles an hour." (Rec. 56.)

He also testified:

- "The customary signal that Dr. Rininger gave me to go ahead was a nod of the head. I could not say exactly how far we were from the track when he gave this signal, but according to my best recollection I was possibly 5 or 10 feet back from where I first saw the car. I should judge something like 30 or 35 feet from the track.
- Q. Now do you wish to say, Mr. Brodnix, that from 30 to 35 feet back from the track there would be any point between the crossing and Allentown where an ordinary passenger train would be obscured from view by reason of this bluff?
- A. Well now, as to that I could not say." (Rec. 59.)

He further testified that he had lived in Seattle and King County for six or seven months before the accident and knew that trains passed over the interurban track at very frequent intervals (Rec. 60); that as we were going toward this road crossing there was no point at which we stopped before reaching the track for the purpose of looking and listening to see if there was any train coming, and there was no time at which we were running less than twelve miles an hour until the train was within 25 feet of us and I applied the brakes." (Rec. 61.)

Elora Lamb, a witness for plaintiffs in error, testified: That he was a chauffeur; that at the time of the accident he was standing on the passenger platform at Riverton waiting for a north-bound train; that he saw Doctor Rininger's automobile as it was approaching the crossing; that the automobile was approaching the crossing at a speed of between 12 and 15 miles an hour (Rec. 89); that he had been driving automobiles about six years; that an automobile such as Doctor Rininger's running at a speed of 15 miles an hour, could not, in his opinion, under emergency be stopped within less than from 20 to 25 feet; that if it had been running at 12 miles an hour, it could have been stopped within 15 feet. (Rec. 92.)

The following testimony was given by witnesses for defendant in error:

Mr. Overlock testified that he drove his own machine, and that:

"I am familiar with what is known as a

four-seated Stearns machine. From my experience in handling my own machine and knowledge of other automobiles, and my familiarity with this crossing, I think on a dry day when the road was dry and dusty and as the road actually existed there in the latter part of July, 1912, a four-seated automobile carrying four passengers, weighing between 4,500 and 5,000 pounds, driving toward the track from the westerly side at 12 miles on hour, such a machine could be stopped within 10 or 12 feet."

Q. Taking the same conditions, the same machine, as I have put in my other questions, if in stopping that machine it stopped at a point with the front wheels very near the first rail of the track, but not quite to the rail, and marks on the ground show that the rear wheels had skidded from 35 to 40 feet, that the rear wheels had locked and skidded along the road for 35 or 40 feet, at what rate of speed, in your judgment, was the automobile traveling when the brakes were applied?

A. I should say at least 30 miles an hour." (Rec. 122-123.)

He further testified that he went back after the accident, saw the marks on the ground where the Rininger automobile had skidded, and judged them to be 30 feet in length; that in his opinion, if the automobile skidded 30 feet with the wheels locked,

it could not have been going less than 25 miles an hour. (Rec. 127.)

Mr. Hill testified: That he saw the skid marks on the road; that they were 25 or 30 feet in length and came down to within 8 or 10 feet of the track, or about the length of the machine, and that the road was dry. (Rec. 129.)

Mr. Rosenburg testified: That when the automobile was within 75 feet of the track, it was running between 15 and 20 miles an hour (Rec. 142); that on the afternoon of the day of the accident, the surface of the road was dry and dusty; that

"I noticed after the accident marks on the road to show that the automobile had skidded. I saw the skid marks from the tires of the machine which had raked off the grevish surface of the road and had the appearance as if it burned the surface of the road by taking off the grey surface and leaving the brown skid marks on the road (Rec. 146); I was requested to make a mark on the road and to drive a spike showing where the skidding began, and I took a line mark from the store window to a cross fence on the interurban right of way, a fence that goes across the right of way from the south end of the platform to the extreme west boundary of the right of way, and I fixed my line of vision on that fence, and had a perpendicular line on the road about where the skid started, which I had obtained by sighting across the road from a point on the one side

to a point on the other, which I have just described, and I have measured the distance from this line as fixed by me down to the tracks, which is 39½ feet. (Rec. 147.")

That at a point in the center of the county road, 60 feet west of the track, a train could be seen coming the entire distance from Allentown to the Riverton crossing. (Rec. 154.)

Mr. Sharp testified: That at the time of the accident he was on the east side of the track at Riverton, and saw the automobile before it was struck; that when he first noticed the automobile it was about 40 feet from the track, moving at a speed of from 25 to 30 miles an hour; that the wheels were then locked and skidding, and that the automobile skidded about 40 feet until it came to a stop. (Rec. 168-169.)

Mrs. Rosenberg testified: That she was in the store looking out of the window when the automobile passed, and that while she could not estimate the rate of speed in miles per hour, it seemed to her "it was going fast"; that she afterward pointed out where the automobile was when she first saw it and a measurement showed it to have been 97 or 98 feet from the track, and that as the automobile passed her range of vision through the door, it did not seem to slacken speed any. (Rec. 172-173.)

Mr. Apt, who was a passenger on the train, seated on the right hand side and next to the direction from which the automobile was approaching, testified:

"When we were within 150 to 200 feet of the crossing, I was looking out of the window and saw the automobile which was struck. When I first saw the automobile the train was about 50 feet from the crossing. The automobile was about 50 feet from the crossing when I first saw it. It was moving toward the crossing. The train and the automobile were just about the same distance from the crossing, when I saw it, as I had been looking down toward the crossing some time before I saw it, and there was nothing that obstructed my view of it until I came right around the bluff, and I saw the left rear wheel skidding, as that was the side toward me, so that it was skidding when it was 50 feet from the track.

I am able to have a reasonably correct estimate of the rate of speed at which the train was moving when I saw the automobile, and I should think it was moving from 30 to 35 miles per hour. The speed of the automobile when I first saw it seemed to be just about the same as the speed of the train. I saw Dr. Rininger standing up in his machine, as the top of it was down, and I should say the auto was within 20 or 25 feet of the track when the doctor rose to his feet. After I saw the auto, I do not think the wheels revolved at all.

When I got back to the crossing, I saw fresh marks on the roadway which showed that the wheels had skidded, and I estimated that the

length of the skid marks on the ground was about 40 feet. These skid marks stopped about 13 feet before they got to the rail." (Rec. 192 to 194.)

Mr. Herpick testified: That he was riding on the train involved in the accident; that he was seated in the forward end of the car on the right hand side, next to an open window, looking out most of the time; that he saw the automobile before the collision and when it was about 50 or 55 feet from the crossing; that the front end of the train was about the same distance therefrom (Rec. 200); that when he first saw the automobile, it was running from 18 to 20 miles an hour, and the train was moving about 30 or 35 miles an hour; that there was nothing to cut off his view of the automobile while he was leaning out of the window looking in that direction; that when he went back to the crossing, he saw fresh skid marks on the road, and although he paid no attention to the length of them, he was positive they were 20 feet long. (Rec. 201-202.)

Mr. Bressler, conductor of the north-bound limited which reached the crossing something less than half an hour after the accident, testified: That his attention was called to the skid marks on the county road west of the tracks; that he could see them distinctly, and that in his opinion, the distance from the easterly end of the skid marks to the westerly rail of the south-bound track was 10 to 12 feet, and

that the skid marks themselves extended about 30 feet. (Rec. 241-242.)

Mr. Robson, who was motorman of the train involved in the accident, testified: That he did not see the automobile until he got within 50 or 80 feet of the crossing, at which time the automobile was about 50 feet from the track. (Rec. 210.)

Mr. Will H. Morris, a witness for plaintiffs in error—a lawyer of long standing in Seattle and a friend of Doctor Rininger—testified: That he reached the scene of the accident shortly after it occurred; saw the skid marks on the county road west of the crossing; that he stepped their length and estimated them at 21 or  $21\frac{1}{2}$  feet; that the road was dry and pretty solid, although there was not so much dust at this particular place; and that the easterly end of the skid marks came to within an automobile's length of the westerly rail. (Rec. 229-232.)

Whatever discrepancies there may be in the mere opinion of witnesses as to how far west of the track a train could be seen approaching all the way from Allentown, the fact, we submit, is conclusively fixed by the photographs taken by Mr. Aldrich, a professional commercial photographer. For the purpose of having these views taken, a special train was sent to Riverton, and the various distances the train was stopped north of the crossing were ascertained by actual measurement before the train was moved. These photographs were received in evidence without objection, marked respectively Exhibits "B,"

"C," "D," "E," "F," "G," and "H" and have been forwarded to the clerk of this court.

In taking the photographs marked "C," "D," "E," "F" and "G," the camera was located in the center of the county road 64 feet west of the west rail of the south-bound track, looking in the direction from which the car which collided with the automobile approached the crossing. Exhibit "C" shows a railroad coach 1,170 feet north of the crossing. Exhibit "D" shows a coach 890 feet north of the crossing. Exhibit "E" shows a coach 783 feet north of the crossing. Exhibit "F" shows a coach 360 feet north of the crossing, that being the point in the curve of the track where a train would pass most nearly out of view of a person standing on the county road 64 feet west of the track. Exhibit "G" shows a coach 240 feet north of the crossing. In taking the photograph marked Exhibit "H," the coach was stopped 550 feet north of the crossing and the camera was standing upon the motorman's vestibule looking south toward the crossing. This picture shows an automobile standing on the county road 64 feet west of the track. The automobile is indicated by a small cross placed directly above it on the picture. Of course, if the automobile could have been seen from the forward platform of the train while the train was 550 feet from the crossing and the automobile 64 feet west thereof, it follows that Mr. Brodnix could have seen the train 550 feet away when he was 64 feet from the crossing.

Even though the motorman could have seen the

automobile when it and the train were at the points just referred to, it was not the duty of the motorman to stop his train, for he would have had a legal right to presume that the driver of the automobile would stop until the train had passed.

Christensen vs. Union Trunk Line, 6 Wash. 75, 79.

Helber vs. Spokane St. Ry. Co., 22 Wash. 319, 322.

Woolf vs. Washington R. N. Co., 37 Wash. 491, 504.

Duteau vs. Seattle Electric Co., 45 Wash. 418.

Mey vs. Seattle Electric Co., 47 Wash. 497. Pantages vs. Seattle Electric Co., 55 Wash. 453.

In the case last cited, the following instruction was requested and refused:

"You are instructed that if you find that the motorman saw the automobile upon the track and there was nothing to obstruct the view of the occupants of the automobile of the approaching car, such motorman had a right to assume that the automobile would be turned off the track and out of danger in time to avoid a collision, and the motorman had a right to indulge in such assumption until the danger of a collision became imminent,"

the Court saying: "This requested instruction clearly states the law of the case and should have been given."

It appears then by the admission of Mr. Brodnix himself that he had passed over this crossing six or seven times within the preceding six months and was somewhat familiar with it; that he knew the railroad tracks and the bluff were there, and that trains passed over the tracks at frequent intervals; that he first saw the train approaching across the point of the bluff, at which time he was within 25 or 30 feet of the track, and was then running at the rate of 12 miles an hour; that he at no time was running less than 12 miles an hour as he approached the track; that he at no time stopped to look and listen; that when he disengaged his clutch from the engine 300 feet west of the track, his engine continued to run and made as much noise as it would have made if he had not disengaged it; that the noise of his engine to some extent interfered with his ability to hear an approaching train; that when he got to a point where he could first see the train, he applied his brakes with such force as to lock both rear wheels of the automobile, which skidded up to a point so close to the rails of the track before it came to a stop that it was struck by the overhang of the train, and that running at 12 miles an hour. it took him 25 feet to stop.

The exhibits we have referred to show beyond contradiction that at a point 64 feet west of the track Mr. Brodnix could have seen the approaching train all the way from Allentown, 2,000 feet away. There was nothing to obscure his view from that point on, and the nearer he got to the track the

better would he have been able to see the train. There can be no doubt about the fact that when he got to within 30 feet of the track—the greatest distance he says he was away when he first saw the train—he could have seen it clearly and distinctly for at least 2,000 feet. Taking his own version, and reading the evidence most strongly in favor of the plaintiffs in error, Mr. Brodnix as he approached the track, knowing the bluff was there, was running his automobile at such a speed that he was unable to stop the same in order to avoid a collision after he got to a point where he could see whether or not a train was approaching. If one drives an automobile towards a railroad track. knowing that trains pass thereover at frequent intervals, at such a rate of speed that he cannot stop in order to prevent accident, after he gets to a point where he can see whether or not a train is coming, and nevertheless will be permitted to recover, the law of contributory negligence, we submit, must be erased from the books.

In discussing this question upon the theory that the automobile was only running 12 miles an hour, we have taken the most favorable view possible for plaintiffs in error.

Mr. Lamb, one of plaintiffs' own witnesses, testified that in his opinion the automobile was running at from 12 to 15 miles an hour as it approached the track, and if it had been running at 12 miles an hour, could have been stopped in 15 feet.

Mr. Overlock, who drives his own automobile and

was thoroughly familiar with the condition of the crossing at the time of the accident, testified that in his opinion it could have been stopped within from 10 to 15 feet if running at no greater rate than 12 miles an hour. That it was running at a much higher rate of speed is shown by the testimony of Mrs. Rosenberg, who says that when it passed the front of her store it was going fast; and by that of Mr. Rosenberg, who was standing by the roadside, and says that when the automobile passed him, it was going from 15 to 20 miles an hour. The most convincing proof that the automobile could not have been running less than 25 miles an hour when Mr. Brodnix applied his brakes, is the length of the skid marks upon the road, which were certainly not less than 25 or 30 feet in length.

While it appears that commencing about 300 feet from the track, the county road descended toward the same on a four per cent. grade, the testimony of Mr. Woodworth, who made actual measurements upon the ground, shows that for a distance of 30 feet west of the track, the road was level. The road was of macadam, had been newly repaired, and was dry and firm. Certainly no better braking or resisting surface could well be imagined.

For the purpose of showing what rate of speed the length of these skid marks indicated, defendant in error placed upon the stand three expert automobile men, the first of whom, Mr. De Jarlius, testified that he owns three automobiles kept for hire and understands their practical operation; that he was familiar with the Riverton crossing in the latter part of July, 1912, having passed over it every summer an average of once a week; that a Stearns automobile, weighing 4,500 pounds, approaching the crossing from the west, on a dry day, running at 12 miles an hour, could be stopped within a distance of 12 feet; that if such an automobile approaching the tracks from the west should skid from a point 39 feet west of the west rail, coming to a stop with the front wheels practically at the rail, it would indicate in his judgment that when the brakes were applied, the automobile was going at not less than 30 or 35 miles an hour. (Rec. 177.)

Mr. Taylor testified: That he is an automobile engineer and understands their practical operation; that for four years he was superintendent of the Winton Motor Carriage Company, having entire control of all the cars both in the building and outside, which necessitated a great deal of driving and the operation of heavy automobiles; that previous to that time he was a tester for the Olds Motor Works, and also tester for the Ford Company; that he was familiar with the Riverton crossing; that if a sixty horse power automobile weighing 4,500 pounds and carrying four passengers, should approach the Riverton crossing from the west, on a dry warm afternoon, and the brake was applied with such force as to lock the two rear wheels, so that the machine thereafter skidded a distance of 39 feet and came to a stop with the front wheels almost but not quite upon the west rail of the

track, in his opinion such automobile at the time the wheels were locked could not have been traveling less than 30 miles an hour; that if under the same conditions such automobile skidded 25 feet, in his opinion its rate of speed at the time the wheels were locked would have been a little better than 20 miles an hour; that if such a machine under the same conditions, was approaching the crossing in question at a speed of 12 miles an hour, it could have been stopped within a distance of 12 feet; that if such an automobile at the same place and going in the same direction, were running at the rate of 15 miles an hour, and the wheels were locked, it would probably skid 16 feet; that he had tested the matter out several times and knew he could stop a loaded automobile running at 12 miles an hour in 12 feet on a down grade up to 5 or 6 per cent. (Rec. 179 to 182.)

Mr. Stabler testified: That he had been a chauffeur for nine years and had driven nearly all of the principal makes of automobiles, such as Packards, Pierce-Arrows and Stearns; that he was familiar with the crossing at Riverton, having passed over it many times, and as often as four or five times a week during the summer of 1913; that in his opinion if a Stearns automobile carrying four persons should skid 30 feet in approaching the track from the west, coming to a stop with the front wheels very near the first rail of the track, such automobile would have been running in the neighborhood of 30 miles an hour when the wheels began to skid,

and that such an automobile carrying the same passengers and approaching the track from the same direction, running at 12 miles an hour, could be stopped within the length of the automobile, or within about 12 feet. (Rec. 205-206.)

No attempt was made to meet this evidence, except that plaintiffs in error placed upon the stand a Mr. Krandall, who testified that he was an automobile mechanic, but was not familiar with the Riverton crossing, and that going at a speed of from 15 to 20 miles an hour, at one time he would skid probably 10 feet in making a stop, and the next time pretty nearly 20 feet. (Rec. 236.)

If it be true that such uncertainty does exist as to the distance within which an automobile can be stopped, it seems to us that all the more care should be exercised by one approaching so dangerous a place as a railroad crossing. It is true that some of the cases hold that there are conditions under which it is not the imperative duty of a traveler upon a highway to stop, in addition to looking and listening, before attempting to cross railway tracks, but these cases, we think, it will be found are where the facts show that stopping could neither aid the sense of sight nor that of hearing. If one should attempt to drive across a railroad track in a perfeetly open country where there were no obstructions to the view or hearing of the driver, it could very logically be held that the failure to stop was not negligence, since such act would not aid the sense of sight or hearing. It has, however, so far as we have been able to discover, never been held that where there are obstructions such as embankments, buildings or shrubbery, which cut off the view or deaden the sound, it is unnecessary to stop, if such precaution is required in order to aid the sense of sight or hearing.

That a railroad track is in itself a warning of danger; that a traveler upon a highway approaching such track must look and listen, and stop if necessary, at a point where looking and listening will avail him in determining whether or not a train is approaching; that to look and listen at a point where the view is obstructed or sound would be deadened, is unavailing, and that one must in addition stop before attempting to cross the tracks, if by so doing stopping will aid his senses, we invite the Court's attention to the following cases:

Railroad Co. vs. Houston, 95 U. S., 697.

Schofield vs. Railway Co., 114 U.S., 615.

Northern Pac. R. R. Co. vs. Freeman, 174 U. S., 379.

Horn vs. Railroad Co. (C. C. A. 6th Ct.), 54 Fed. 301.

Shatto vs. Railroad Co. (C. C. A. 6th Ct.), 121 Fed., 678.

Chicago, etc., Ry. Co. vs. Smith (C. C. A. 8th Ct.), 141 Fed., 930.

Davis vs. Railway Co. (C. C. A. 8th Ct.), 159 Fed., 10.

Chicago, etc., R. R. Co. vs. Munger (C. C. A. 8th Ct.), 168 Fed. 690.

Erie R. R. Co. vs. Schultz (C. C. A. 6th Ct.), 173 Fed., 759.

Brommer vs. Railroad Co. (C. C. A. 3rd Ct.), 179 Fed., 577.

Chicago, etc., R. R. Co. vs. Bennett (C. C. A. 8th Ct.), 181 Fed. 799.

Grimsley vs. Northern Pac. R. R. Co., (C. C. A. 8th Ct.), 187 Fed., 587.

Northern Pac. R. R. Co. vs. Alderson (C. C. A. 9th Ct.), 199 Fed., 735.

Bowden vs. Railway Co., 79 Wash., 184.

Cable vs. Railway Co., 50 Wash., 619.

Neininger vs. Cowan (C. C. A. 4th Ct.), 101 Fed. 787.

In the case of Railroad Co. vs. Houston (95 U. S., 697), Justice Field says (p. 702):

"But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty

of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

The case of Northern Pac. R. R. Co. vs. Freeman (174 U. S., 379) went up on a writ of error to this court. The facts are that for several hundred feet on either side of the highway crossing there was a cut of about eight feet below the surface of the surrounding country through which the railway ran. The highway approached the crossing by a gradual decline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of a train approaching either from the north or south was cut off by the banks of the excavation

on either side of the highway, but at a distance of about 40 feet before reaching the track the railroad emerged from the cut and the view up the track for about 300 feet was unobstructed. Plaintiff's decedent approached the crossing in a wagon drawn by two horses at a slow trot. Decedent did not stop until his wagon and team were struck. In holding that decedent was guilty of such contributory negligence as to bar a recovery, the court says:

"So far, then, as there was any oral testimony upon the subject, it tended to show that the deceased neither stopped, looked nor listened before crossing the track, and there was nothing to contradict it. Assuming, however, that these witnesses, though uncontradicted, might have been mistaken, and that the jury were at liberty to disregard their testimony and to find that he did comply with the law in this particular, we are confronted by a still more serious difficulty in the fact that if he had looked and listened he would certainly have seen the engine in time to stop and avoid a collision. He was a young man. His eyesight and hearing were perfectly good. He was acquainted with the crossing, with the general character of the country, and with the depth of the excavation made by the highway and the railway. The testimony is practically uncontradicted that for a distance of forty feet from the railway track he could have seen the train approaching at a distance of about 300

feet, and as the train was a freight train, going at a speed not exceeding twenty miles an hour, he would have had no difficulty in avoiding it. When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken. \* \* \* If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence. \* \* \* Upon the whole, we are of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor."

In Horn vs. Railroad Co. (54 Fed., 301), it appears that deceased was killed at a street crossing

in the village of Utica. He was driving toward the track in a one-horse covered wagon, and failed to stop in order to ascertain whether or not the train was approaching. In holding that under such circumstances no recovery could be had, the court says (p. 206):

"While his conduct is persuasive that he did not hear the whistle, or the coming of the train, it is clear that, had he stopped and listened, he would have heard, at least, as others did, the warning of the whistle, if not the noise of the train. Assuming the correctness of the estimated speed at 50 miles per hour, it was evidently but 75 feet from the crossing when Horn's horse halted in his walk on the side track, not eight feet from the main track. It is incredible that the decedent, if his sense of hearing was not blunted, could have failed to notice the approach of the train; and it is obvious that, if he did hear it, he must have made a fatal miscalculation as to its proximity when he urged the horse over the crossing. is no evidence that there was anything calculated to divert his attention, prevent his hearing, or lull him into security. In short, there is nothing to extenuate the recklessness of his approach to the crossing."

In Shatto vs. Railroad Co. (121 Fed., 678), plaintiff was struck and injured by a train in the city of Sharon, Pennsylvania, while attempting to drive across the track, his view being obstructed by

board fences, dwelling houses, etc., until he was very near the track. The court held that plaintiff's failure to stop before driving on the track precluded a recovery and used the following language (p. 680):

"Where the view of the track is obscured so that one's vision can be of no service in enabling him to know of the approach of a train, and the traveler is required to rely upon his sense of hearing only, it must be an exceptional case which excuses one from stopping and listening before going into the danger which may be impending without other warning than he can get from his sense of hearing. A person, under such circumstances, may not rely implicitly upon the railroad company giving proper signals before approaching the crossing, but must make use of his own faculties for self-protection."

In Chicago, etc. Ry. Co. vs. Smith (141 Fed., 930), it is said:

"The law requires of one going into so dangerous a place (a railroad crossing) the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for his protection, and if this duty is neglected and injury results, there can be no recovery, although the injury would not have occurred but for the negligence of others."

In Davis vs. Railway Co. (159 Fed., 10), plaintiff and a friend were driving along a public high-

way in a vehicle drawn by one horse. It is stated in the opinion that:

"They admitted that as they approached the crossing they were engaged in general conversation, and trotted the horse to within 20 or 25 feet of the crossing before the driver slowed him to a walk. They did this when, according to their testimony, they knew that at a distance of about 30 feet from the track they could not see a train coming through the cut from the west a greater distance than 50 feet; though the actual measurement and experiments made demonstrate that 34 feet back from the track a train could have been seen at a distance of about 90 feet. At a distance of 15 feet from the crossing the proof showed that the train could be seen 232 feet."

An instructed verdict for defendant was sustained, the court saying (p. 14):

"Judges know without evidence taken that the clatter of a horse's hoofs on a road when trotting, and a vehicle thus in motion, under the most favorable circumstances, will make such an amount of noise as will obstruct the conveyance of sounds to the ear—that they lessen the chances of hearing distinctly. And, therefore, on approaching a known place of danger at a railroad crossing, they should exercise a degree of care commensurate with the hazard to be encountered demanded of them,

and, where both the senses of vision and hearing were thus obstructed, they should take the next ordinary, practical, and sensible course of stopping to look and listen."

In Erie R. R. Co. vs. Shultz (173 Fed., 759), plaintiff's ward was driving a team across a railroad track in the City of Cleveland and was injured as the result of a collision with an approaching train. The negligence charged was that the railroad failed to close its gates at the crossing. In holding that it was the duty of the driver to stop before passing onto the tracks, the court says (p. 762):

"The place was one of grave danger. Trains and engines running light were frequently passing to and fro. He had a heavy load which could not be quickly moved out of the way. True, there was a string of cars standing on the dead track, which for a time would obscure his view to the east. Whether he could have seen the engine in time to have stopped after passing that obstruction, soon enough to have avoided the danger, is in fair doubt. It seems from the record probable, but not certain that he could. If he could not, it was his duty to stop and listen. But he took no care whatever. His conduct was the same as if there had been no railroad crossing there. Apparently he assumed that the gates being up, he had no need to watch. That it is incumbent on one crossing a railroad, who cannot, on account of obstructions, look along the track, to stop, if necessary to listen, has been often held."

In Brommer vs. Railroad Co. (179 Fed., 577) it appears that Brommer was driving an automobile over a grade crossing in Camden, New Jersey. He came in sight of the tracks when 170 feet distant therefrom, the street sloping toward the crossing. In stating the facts, it is said in the opinion (p. 579):

"And, as summed up by Brommer's counsel, the evidence on both sides showed obstacles to vision up to within 30 or 40 feet of the track." Actual measurements and photographs testified to by defendant's witnesses show that at a point 30 feet back from the track there was a clear view to the left down the track for 1,400 feet. But taking the estimate made in plaintiff's proof, there was a viewpoint within 30 or 40 feet of the track for 500 or 600 feet."

And further on the following language is used:

"Now, the plaintiff, by his own showing, had a vantage point 30 or 40 feet from the track where he could have stopped and seen a train at least 500 feet away. And it is equally clear that, if he had stopped and looked, this accident would not have happened. In the Maidment Case, *supra*, we said:

'The duty of an automobile driver approaching tracks, where there is restricted vision, to stop, look, and listen, and to do so at a time and

place where stopping and where looking and where listening will be effective, is a positive duty.'

"This rule is conducive to safety, and observation and experience have deepened our conviction of its soundness. We therefore adhere to it and now restate it, and the court below was clearly right in holding it as conclusive of this case. Here, as there, the driver of the machine, when stopping, looking and listening, would have prevented the accident, made chance, not stopping, the guaranty of his safety. It will not avail to say he looked and listened as he approached the crossing, and therefore there was no call to stop, for it is manifest either that he was going at such high rate of speed as to necessitate a deep swerve to avoid striking the flagman, or if he was approaching at the slow, two-mile-an-hour rate his witness says he was, he did not look, for if he had he would have seen this train 500 feet up the track, and with his machine under control, as the witness said it was, he would have stopped. 'If a traveler,' says Wharton's Law of Negligence, quoted with approval in Pennsylvania vs. Righter, 42 N. J. Law, 186, 'by looking along the road, could have seen an approaching train in time to escape, it will be inferred, in case of collision, that he did not look, or, looking, did not heed what he saw.' To the same effect are authorities cited in Elliott on

Railroads, Sec. 1165. And the presumption of the law that he did not look when he came to this 30-foot vantage point is confirmed by the proof he produced."

The decision just referred to is somewhat lengthy, but is so nearly on all fours with the case at bar that we earnestly request the court to read the opinion in full.

In Chicago, etc., Ry. Co. vs. Bennett (181 Fed., 799) the facts are that the plaintiff drove his wagon and team upon the railroad at a crossing in a cut about eight feet deep, and was struck and injured by a passing train. He sought to recover upon the ground that the defendant failed to ring any bell or sound any whistle to give warning of the train's approach. In holding that the defendant's motion for an instructed verdict should have been granted, the court says (p. 803):

"But, conceding that the whistle was not sounded and the bell was not rung, these facts do not excuse the plaintiff from exercising ordinary care to protect himself from a collision at the crossing. A railroad track is a constant warning of danger. The engines and trains must run over them so rapidly that their operators cannot alone protect travelers on the highways which cross them. The law requires railroad companies to sound their whistles and ring their bells as their trains approach the crossings, and it also requires travelers on the highways to exercise ordinary care, to use efficiently

their senses of sight and hearing to prevent collisions. The failure of the servants of the companies to discharge their duties in this regard is no excuse for the failure of travelers on a highway to discharge theirs. The latter are still bound by the law to listen and look effectively before they enter upon a railroad track. \* \* \*

Did the plaintiff faithfully discharge that duty? For 30 rods before his horses' heads came to a point one foot south of the railroad track, where he was in a position whence he could not escape the coming train, his eyes were useless, looking was futile, and he knew it. This fact imposed upon him the duty to make a more diligent use of his sense of hearing, or to stop his horses and go forward where he could see before he drove into the place of irremediable danger."

In Grimsley vs. Ry. Co. (187 Fed., 587), the facts are that plaintiff's intestate was killed while driving a wagon and team across the tracks of the railway in the village of Medina. The train was running at about 40 miles an hour and was not scheduled to and did not stop at the village mentioned. As the deceased approached the track, his view was obstructed by a snow fence, a grain elevator, certain box cars, and the smoke and steam from a standing engine. Notwithstanding these obstructions to his sight and hearing, he drove upon the track without stopping in order to enable him better to look

and listen. In approving a directed verdict for the defendant, the court says (p. 589):

"The testimony shows without any dispute that from the passing track to the main track, where Grimsley was killed, the distance is some 45 feet, and for that distance there was an unobstructed view of the main track for several hundred feet to the east, except as it was obscured by the smoke and steam of the standing engine; that the obstruction so caused was not continuous, but was intermittent and temporary only, rising and falling with the wind. Giving to the plaintiff the benefit of every inference that may reasonably be drawn in her favor from the testimony, it is clear that, if Grimsley had made a reasonable effort to do so, he would have discovered the approaching train in time to have avoided a collision with it. He was in full possession of the senses of sight and hearing, and it was his duty to make reasonable use of both to ascertain if a train was approaching upon the track he was about to cross. track was in plain view, and was in itself a warning of danger, and if his view to the east was obstructed, as it is contended that it was, it was his duty to listen, and, if necessary, to stop his team, to ascertain if he might safely cross the track in front of the mail train. Instead of doing so, he deliberately drove upon the track and to his death. The mail train was certainly approaching rapidly upon the main track, and

it seems incredible that he did not see it; and if he had stopped and listened he could not have failed to discover its presence.

"It is said that he did look to the east after crossing the passing track. But if he did, and the plaintiff's contention is correct, then he must have discovered that his view of the track to the east was obscured; and he looked at a time when it availed him nothing to do so. That made it all the more imperative that he listen, and, if necessary, stop, that he might ascertain whether or not he was in the presence of danger. That he failed to stop his team is testified by at least two of the plaintiff's witnesses. If he had stopped, it is incredible that he should not have heard the train. Admitting that defendant was negligent as charged, the conclusion is unavoidable that Grimsley was inexcusably negligent in not discovering the approach of the mail train, and that such negligence was the direct and immediate cause of his death, and will preclude a recovery by his estate or dependent relatives therefor. case upon its facts falls within the rule held by this court in Railway Co. vs. Andrews, 130 Fed., 65-73, 64 C. C. A. 339."

In Northern Pac. Ry. Co. vs. Alderson (199 Fed., 735), which went up from the District of Washington, this court says (p. 740):

"It is undoubtedly true that travelers upon the public highway approaching a railroad

crossing where passing trains are to be expected, are required to use their senses, of both seeing and hearing, to detect the approach of such trains, and that, when the track is obscured to the sight, greater care is devolved upon them in the use of their sense of hearing, because the capacity for detecting the danger has been diminished. In listening, they must be so disposed as probably to listen effectively; otherwise, still greater care should be observed by not venturing upon the track until it is ascertained that it will be clear—especially if trains are passing frequently. Chicago & N. W. Ry. Co. v. Andrews, 130 Fed., 65, 73; 64 C. C. A. 399; Chicago M. & St. P. Ry. Co. v. Bennett, 181 Fed. 799, 104 C. C. A. 309.

"Alderson and wife say that the railroad track was obscured, by trees, brush, and weeds, from near the east end of the bridge in the roadway to within 10 or 12 feet of the track. That imposed upon them the precaution of stopping within a short distance of the track and listening for an approaching train."

It is true the court held that the case was properly submitted to the jury, but such holding was based upon the fact that there was a direct conflict in the evidence upon the question as to whether or not the driver of the wagon in which Mrs. Alderson was riding stopped for the purpose of looking and listening before driving upon the track. No such question is presented in the case at bar, since it is

admitted by Mr. Brodnix that he at no time stopped as he approached the track until he saw the train coming, when he applied his brakes at a point so near the track that he was unable to stop in order to avoid the accident.

In Bowden vs. Walla Walla, etc., Ry. Co., 79 Wash., 184, the facts are that the plaintiff was driving an automobile toward a country railway crossing at a speed of about 20 miles an hour, during the middle of the afternoon on a bright sunny day. At a point 100 feet from the crossing he could have seen a car 200 feet away. At 50 feet from the crossing he could have seen a car from 250 to 300 feet away, and at 40 feet from the crossing a car 300 feet away would have been in plain sight. In holding that plaintiff was guilty of such contributory negligence as to bar a recovery, in the manner in which he approached the crossing, the Supreme Court of this state uses the following language (p. 187):

"The driver of an automobile, approaching such a crossing as the one in this case, must make reasonable use of his senses to guard his own safety, and the failure to do so is negligence. Such a person cannot take a last look at one hundred and fifty to one hundred and seventy-five feet distance from the crossing, and then shut his eyes and go blindly forward. While we shall not attempt to say within what distance respondents should have looked for an approaching car before attempting the crossing, the law does require that such a look must

be taken within such a distance as to enable one to ascertain whether or not there is an approaching car in sight. Beeman v. Puget Sound Traction, Light & Power Co., ante, p. 147, 139 Pac. 1087, and cases there cited. Had respondent taken such precaution, this accident would not have happened."

In Neininger v. Cowan, (C. C. A. 4th Ct.), 101 Fed., 787, the facts are that plaintiff was injured while attempting to cross a railroad track in the City of Wheeling at about five o'clock in the morning of April 23rd. He was driving a two-horse wagon, the horses trotting until he got to within fifty or sixty feet of the track, when he pulled his team down to a walk, and, without stopping, continued his course up to and upon the railroad track, where the wagon was struck by a passing train. The city ordinances of Wheeling required the railroad company to maintain a gate in charge of a flagman at this crossing. No gate and no watchman was there, however, at the time of the accident. As the plaintiff approached the tracks his view thereof was obstructed by a two-story brick building until he got within ten feet of the track, from which point he could see about sixty-four feet along the track. In sustaining a directed verdict for the defendant, the court held that although the defendant was guilty of negligence in failing to maintain gates or station a flagman as required by the city ordinances, the plaintiff himself was nevertheless guilty of such contributory negligence, in failing to

stop before driving upon the track, as to preclude a recovery, and that the trial court properly directed a verdict, saying (p. 791):

"The track at the crossing in itself gave warning of danger. The absence of gates and the nonappearance of a flagman at that point gave significance to this warning. Entering Main Street in his wagon, he trotted his horses towards the railroad crossing until he reached a point 50 or 60 feet from it. Then he slowed down to a walk, but kept going on. His plain duty, approaching that crossing, was to stop, look, and listen. Had he, instead of going on the west side of the street, gone on the opposite side, he could have looked upon the track, up and down, before he reached the crossing. Instead of this, he selected the other side, from which his opportunity of seeing was prevented by the buildings at the corner of the crossing, and his ability of hearing distinctly was diminished by the same cause. Under these circumstances, unable to see as well as to hear, it was all the more incumbent upon him to stop. This he did not do. Something must have prevented him from hearing the train. One of his witnesses, who was on that train, whose attention was not specially called to the fact, stated that as they were approaching the crossing the engine was giving that loud, puffing noise, indicating that it was going up grade. Plaintiff did not hear this,—whether from inattention. or because of the noise of his moving wagon, does not appear. He did not hear. All the more was it his duty to stop. Ordinary caution would have compelled him to stop. Had he done so before crossing the track, the accident could not have happened. He went on, got on the track, and was injured. He himself contributed to the injury. The judgment of the circuit court is affirmed."

It seems to us so clear from all the evidence, not only that there was a failure to prove that defendant in error was guilty of negligence, but that Doctor Rininger and his chauffeur were guilty of such gross negligence in failing to stop in order to enable them better to ascertain whether or not a train was approaching, and in failing to look and listen at a point where looking and listening would have availed them, and in driving toward a railroad track with which they were familiar, where the view of approaching trains would be cut off by an embankment, at such a rate of speed that they were unable to stop in time to avoid a collision, after they got to a point where they could see an approaching train, that if the case had been permitted to go to the jury and a verdict for plaintiffs in error had been returned, it would have been the duty of the court to set such verdict aside. It hardly seems necessary to cite authority that where a verdict for plaintiff, if returned, should be set aside as not being supported by the evidence, the court should

direct a verdict for defendant. However, we invite the court's attention to

Schofield vs. Chicago, etc., Ry. Co., 114 U. S., 615.

Elliott vs. Chicago, etc. Ry. Co., 150 U.S., 245.

In the Schofield case it is said (p. 618):

"It is the settled law of this court that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

In the Elliott case the same rule is announced in the following language:

"It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

In the case of *Cable vs. Railway Co.*, 50 Wash., 619, the facts are that deceased was driving toward an interurban electric railway crossing at a country station in a buggy. He did not stop before the collision, although his view of the approaching train was obstructed by certain freight cars, buildings,

cordwood and trees. The court held that the rule requiring a traveler upon a highway upon approaching a railway crossing to stop, look and listen, applies to electric interurban railways as well as to steam roads. It was also held that deceased's failure to stop, look and listen, constituted such negligence as prevented a recovery, saying (p. 625):

"From the evidence introduced by appellants we can see no escape from the conclusion that the decedent and his daughter, one of the appellants herein, were chargeable with contributory negligence. It is the rule in this as in most states that a person about to cross a track of a steam railway must stop, look and listen, unless the conditions be such that to do so would avail nothing. The observations and experience of mankind with reference to this class of accidents have led the courts to announce and observe this rule as an appropriate measure of the degree of care and prudence necessary to relieve a person from the charge of negligence, when about to go upon so dangerous a place as the crossing of a railway. We think the same rule applies to an interurban electric railway upon which trains are customarily operated at a high speed. These people did not stop before crossing the railway track. Had they done so shortly before reaching the crossing, they could plainly have seen and heard the approaching train. If they looked or listened, it was not at a time or place where looking or listening revealed to them the true condition of affairs. If, as contended by appellants, there were box cars or other obstructions which obscured the view until decedent and companions were within a short distance of the track, it would seem that this fact should have impressed them with the greater necessity of stopping to look and listen before emerging from behind said obstructions and going upon the track, especially as they had already seen the train coming."

The Supreme Court of this state has held that while the rule requiring one to stop, look and listen before crossing the tracks of a steam or interurban railway, does not apply to its fullest extent in the case of a pedestrian about to cross the tracks of a street railway line in a populous city, at the same time it has held that a pedestrian about to cross the tracks of a street railway and who enters heedlessly into the zone of danger, and without taking the precaution to look and listen at a point where looking and listening will avail him, in order to determine whether or not a street car is approaching, is guilty of such contributory negligence as will prevent a recovery.

If the law requires a pedestrian upon the streets of a city, who can come to an instant halt, to exercise his faculties for the purpose of ascertaining what, if any, danger there is before crossing a street railway track, at a point where looking and listening will inform him as to the approach of a street car, certainly the driver of an automobile running at some twelve to eighteen miles an hour, in approaching a railroad crossing, over which trains run at 30 to 35 miles an hour, where his view is obscured by a bluff, should be required to exercise at least as high a degree of care as that demanded of a pedestrian before crossing a street railway track.

Helleisen vs. Seattle Electric Co., 56 Wash., 278.

Fluhart vs. Seattle Electric Co., 65 Wash., 291.

Steuding vs. Seattle Electric Co., 71 Wash., 476.

Bardshar vs. Seattle Electric Co., 72 Wash., 200.

Since the bluff on the left of the county road would obstruct the view of one approaching the tracks from the west until within a comparatively short distance thereof, a greater degree of vigilance and caution was required of Doctor Rininger and his chauffeur than would otherwise have been the case.

Chicago, etc. Ry. Co. vs. Andrews (C. C. A. 8th Ct.), 130 Fed., 65.

Garlich vs. Railway Co. (C. C. A. 8th Ct.), 131 Fed., 837.

Neininger vs. Cowan (C. C. A. 4th Ct.), 101 Fed., 787, 792.

Shatto vs. Railway Co. (C. C. A. 6th Ct.), 121 Fed., 678.

Garrett vs. Railway Co., 126 Fed., 406.

Stowell vs. Railway Co. (C. C. A. 2nd Ct.), 98 Fed., 520.

Davis vs. Railway Co., 159 Fed., 10.

Counsel attempt to explain the great length of the skid marks upon the road by suggesting that it was rendered slippery from an application of tarvia. That the road was in fact dry and dusty and offered an excellent resisting surface, we think has been shown beyond question.

Mr. Overlock testified that he was there at the time of the accident, saw the skid marks, that there was no pitch, and that the tracks where the automobile had slid showed in the dust. (Rec. 124.)

Mr. Rosenberg, who saw the skid marks immediately after the accident, testified that the road was dry and dusty; that the tires of the automobile had raked off the greyish dusty surface and appeared to have burned the surface of the road by taking off the grey surface and leaving the brown skid marks on the road. (Rec. 146.)

Mr. De Jarlius testified that he was familiar with this road crossing during the latter part of July, 1912, and at that time the road was in fairly good condition, with the exception of bumps, rough in some places due to the road being worn; that the road at this point is only slippery when it is raining, which is true of all asphalt roads. (Rec. 176.)

Mr. Morris, a witness for plaintiffs in error, who

reached the scene of the accident shortly thereafter, testified that the road was dry; that there was not much dust at this particular place, and that the roadbed was pretty solid. (Rec. 231.)

Mr. Morrison testified that he had been a civil engineer for thirty years, and during the year 1912 was county engineer of King County; that he was familiar with the construction of the county road at Riverton; that it is a macadam road, having a base of 4 or 5 inches in thickness made of crushed rock 1½ to 3 inches in dimensions, over which a layer of finer stone is laid, a steam roller being then passed back and forth over the surface; that he had charge of repairing the road in the spring and summer of 1912; that the 100 feet west of the tracks. including other portions of the road, was swept clean of all dust, all ruts were loosened up and new rock placed therein; that a coat of hot tarvia was then brushed over the surface, which was afterward covered with a layer of rock screenings; that a few hours after the tarvia is applied it hardens and produces with the screenings a laver which might be compared to the sole of a shoe; that tarvia makes a perfect bond between the surface of the road and the rock screenings placed on top, which are thoroughly held and imbedded in the tarvia; that such a road offers good friction and the surface is a little rougher than the sheet asphaltum paving found in cities: that the road for 100 feet west of the track is a good one, was treated with tarvia and rock screenings in May, 1912; that during the whole

season a man was detailed once a day to pass over the road and apply a new coat of rock screenings to all places where the tarvia showed signs of coming to the surface, and that all of this work was done under his direct supervision. (Rec. 188 to 190.)

It seems to us, therefore, manifest that the distance the automobile skidded was due to the reckless rate of speed at which it was being driven, and not to any slippery or defective condition of the roadbed.

A few exceptions to the reception and rejection of testimony were preserved, but since no authority has been cited in their support, and they do not appear to have been urged with any degree of confidence in the brief, we will not impose upon the court further by discussing them.

We earnestly insist that upon the entire record it affirmatively and conclusively appears that defendant in error was not shown to have been guilty of any negligence; that Doctor Rininger and his chauffeur were guilty of such gross and reckless carelessness as will bar a recovery, and that the judgment should therefore be affirmed.

Respectfully submitted,

JAMES B. HOWE, HUGH A. TAIT, Attorneys for Defendant in Error.

#### IN THE

# UNITED STATES CICUIT COURT OF APPEALS

#### FOR THE NINTH CIRCUIT

NELLIE M. RININGER and HELEN DOROTHY RININGER, a minor, by A. S. KERRY, her guardian, Plaintiffs in Error,

VS.

PUGET SOUND ELECTRIC RAIL-WAY CO., a corporation, Defendant in Error. No. 2450

#### REPLY BRIEF of PLAINTIFFS IN ERROR

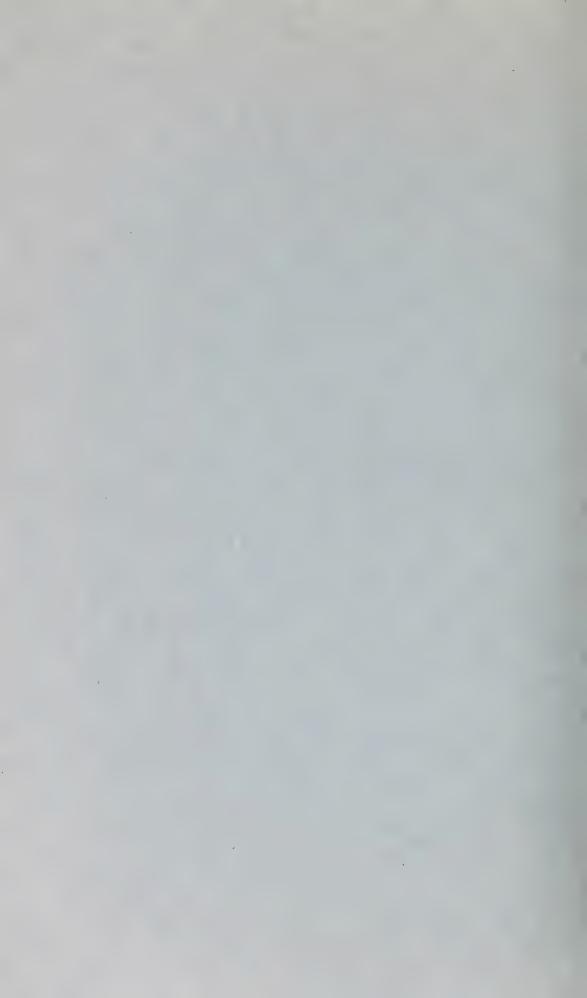
H. H. A. HASTINGS, L. B. STEDMAN, Attorneys for Plaintiff in Error.

Haller Building Seattle, Washington

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F. D. Harrison,



#### IN THE

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vs.

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PUGET SOUND ELECTRIC RAIL-WAY CO., a corporation,

Defendant in Error.

#### REPLY BRIEF of PLAINTIFFS IN ERROR

### ARGUMENT AGAINST MOTION FOR DISMISSAL.

The defendant in error has interposed a motion to dismiss the writ of error in this cause, because plaintiffs in error have not complied with the rule announced in *Masterson vs. Herndon*, 10 Wall. 416; *Ayres vs. Polsdorfer*, 105 Fed. 737; *Ibbs vs. Archer*, 185 Fed. 37, and the other decisions cited on page 7 of the brief of the defendant in error.

The complaint joined as defendants in this action the Puget Sound Electric Railway Company, a corporation, and the Puget Sound Traction, Light & Power Company, a corporation, on the theory that the two companies were owners and operators of the interurban railway which caused the death of Dr. Rininger. The record shows that the Puget Sound Electric Railway Company filed a separate answer admitting its ownership of and that it was operating this interurban railway, but denied liability and also pleaded the defense of contributory negligence. This answer was complete in itself, and made no reference to its co-defendant. It is reasonably apparent from the record that the Puget Sound Traction, Light & Power Company also filed a separate, independent and complete answer denying liability, and also denying that it was interested in the ownership or operation of said railway company. Upon the trial, plaintiffs in error were not able to produce any evidence that connected the Puget Sound Traction, Light & Power Company with the ownership or operation of said railway, and thereupon at the close of the testimony of plaintiffs in error, said defendant, Puget Sound Traction, Light & Power Company, moved "that a judgment of nonsuit be directed in its favor on the ground that it had been in no way connected with the ownership or the operation or management or control of the interurban railway." (Rec. 107.) This motion was granted without objection (Rec. 107). The granting of this motion was in legal effect a judgment dismissing such defendant from the action. That this was so considered by all the parties is shown by the language of the motion made by defendant in error at the close of the introduction of all testimony for a directed verdict, which is as follows: "If the court please, the only remaining defendant in the case, the Puget Sound Electric Railway Company, now moves the jury be instructed to return a verdict in favor of the defendant and against the plaintiffs" (Rec. 243). This motion was granted (Rec. 250). Thereupon, a directed verdict was returned by the jury, in which both defendants were, by oversight, named. The opinion of the court (Rec. 244-250) shows clearly that only the defendant embraced in the last motion was being considered. Thereupon, a judgment of dismissal and a separate judgment for costs in favor of each defendant was entered.

The rule announced in Masterson vs. Henderson, Ayres vs. Polsdorfer and Ibbs vs. Archer, and, in fact, in all of the cases cited in support of the motion to dismiss, is "where the judgment is joint, all the parties against whom it is rendered must join in the writ of error or appeal," and "where a

judgment or decree is rendered against two or more jointly, all must join in suing out the writ of error."

In nearly all of the cases cited is given the reason for this rule, which is that the case shall not be submitted to the appellate court by piecemeal by allowing one joint judgment debtor to sue out one writ of error and another likewise sue out another writ of error, thereby multiplying the work of the court requiring separate hearings, and this result is avoided by requiring that all persons against whom a joint judgment is rendered shall either join in one writ of error or be brought before the court by summons and severance, and they must then either join in the writ of error or be precluded from thereafter suing out a writ of error on their own behalf. In the case at bar, the joint judgment was rendered against Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, and in no respect is this a joint judgment except as against these plaintiffs in error, and they have all joined in the writ of error. If either Mrs. Rininger or her daughter, Helen Dorothy Rininger, had failed to join in the writ of error, then counsel's motion would be apropos. A casual inspection of the cases cited by counsel shows that in each instance the judgment was a joint one against several parties and only one of the judgment debtors sued out a writ of error.

An affirmance or reversal of this cause can in no manner affect the judgment of the lower court in favor of the Puget Sound Traction, Light & Power Company.

In naming defendants in a writ of error, it is only necessary to join those who would be injuriously affected by a reversal of the case.

Foster's Fed. Proc., 3rd Ed. 2, Vol. 1220.

Baskett vs. Hassett, 107 U.S. 602.

Parties whose interests will not be affected by the result in the appellate court need not be parties plaintiff or defendant to the writ of error to the appeal.

Milner vs. Meek, 95 U.S. 252.

Kohler vs. Allen, 114 Fed. 609.

Reed vs. Pawly, 121 Fed. 652.

Mills vs. P. L. & T. Co., 100 Fed. 344.

Amadio vs. Northern Ins. Co., 201 U. S. 193.

In Postal Telegraph Company vs. Vann, 80 Fed. 961, there was but a single plaintiff in the lower court, and it was not joined either as a plaintiff or defendant on the appeal, yet the appeal was sustained for the reasons given above.

Furthermore, this was not a joint judgment in favor of two defendants. It was a dismissal of the action with a separate judgment for costs in favor of each defendant. Either defendant could claim the benefit of this judgment independently of the other.

While the decree may be joint in form, but in law or in fact severable, the mere form of the decree will not make it a joint judgment.

Hanrick vs. Patrick, 119 U.S. 156.

The "New York," 104 Fed. 561.

"A judgment must be regarded as joint only in form, but severable in fact and in law. It is to be read as if it were based upon a finding that the plaintiffs recover as against the defendant for the title asserted against him, and against the intervenors in respect to the title asserted by them against the plaintiffs. The judgment for costs is in fact separated."

Hanrick vs. Patrick, supra.

Inasmuch as no objection was made to the granting of the motion for judgment of non-suit against the Puget Sound Traction, Light & Power Company, it would be treated as a consent judgment, and no relief could be obtained on writ of error to this court against such a judgment, and if that company had been joined as a defendant in error, this court would be obliged to affirm the judgment as against it, and the plaintiffs in error would

be mulct in costs. Furthermore, we have no grievance against the judgment dismissing the Puget Sound Traction, Light & Power Company.

We assume that it will be unnecessary for us to cite authorities authorizing one to appeal or obtain a writ of error from a portion of an adverse judgment or from a judgment where severable relief is granted in favor of several parties and a review is sought of such portion of the judgment as affects but one of the parties in favor of whom such judgment was rendered. We respectfully submit that the motion for dismissal should be denied.

#### RELY ON THE MERITS.

A considerable portion of the brief of defendant in error is given to a discussion attempting to demonstrate that the defendant in error was not guilty of any negligence, and, in order to make application of several authorities quoted, a very unfair statement and marshalling of the evidence has occurred, and consequently we must be permitted to, in a measure, review the authorities of defendant in error and the evidence disclosed by the record.

Defendant in error cites several authorities to sustain the contention that a train may be operated at any rate of speed through country districts, and then covertly claims that the scene of the accident was in the country.

As we have previously pointed out, this was a main thoroughfare crossing the tracks at Riverton. The traffic was very heavy and congested, and during the summer time was practically continuous. There was a business community in the locality of this crossing and a passenger and freight station at that point. It was adjacent to a large city and the thoroughfare was the only southern outlet from this city through a thickly settled community to another large city. In no sense could the Riverton crossing be considered a country district.

The cases cited by counsel practically all, with one exception below noted, deal with conditions pertaining to ordinary country road crossings out in the open country where the travel was very light and where no obstructions intercepted the immediate view of the trains.

In *Dubois vs. Railway Company*, 34 N. Y. S. 276, the crossing involved was in a small town, not on a main thoroughfare, and where the traffic was light.

While railways have the right to operate their trains at a high rate of speed, yet if trains so operated cross main thoroughfares or public highways with considerable traffic thereon, then it becomes the duty of the railway company to provide safeguards to protect the public so using such thoroughfares from danger. This was a dangerous crossing; not only was it dangerous because of the vast amount of traffic crossing it and the frequency of passing trains, but also because of the local conditions. The highway on the east side of the tracks made an abrupt turn to the westward to cross them, while on the west side there was a bluff which prevented travelers, approaching the track from the west, from seeing the tracks north of the crossing until they were within less than 50 feet of it. The curvature of the high bank diverted the sound of signals or rumble of the train so those on the highway west of the tracks could not readily hear it. All these things combined made it a dangerous crossing, and as these conditions had existed for several years, they must have been fully known to defendant in error. Consequently, if it desired to operate its trains at a high rate of speed over this crossing, it was charged with the duty of maintaining safeguards to protect travelers from being injured by such trains.

"We hold that it is the duty of railroad companies in crossing public highways at grade to use all reasonable care to avoid collisions and provide for the safety of travelers who enjoy thereon privileges in common with them; that the degree of care varies with the character of the crossing; whether the view be free or obstructed by trees, fences, buildings or the natural configuration of the land—with the use made of the railway by the traveling public and with the speed and frequency of pasing trains."

Penn. Railway vs. Miller, 99 Fed. 531.

"The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell, and this action is especially applicable when that sound is obstructed by winds and other noises and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable watchmen should be stationed at the crossing."

Continental Company vs. Steed, 95 U. S. 161. "It is very probable, we think, that if a flagman had been stationed at the crossing in question the injuries complained of would not have been sustained and so the jury evidently concluded. We have no fault to find with their conclusion. We think that the trial court properly submitted the issues, as to defendant's negligence in failing to station a flagman at the crossing, to the consideration of the jury."

#### C. G. W. Ry. vs. Kowallski, 92 Fed. 310.

The foregoing citations are excerpts taken from cases cited on page 21 of our opening brief.

Upon examining all of the cases previously cited by us, it will be observed that the rule is firmly

established in the federal courts that, while a rail-road company may, in the operation of its business, run its trains at a high rate of speed, yet if, in so doing, it is obliged to cross public thoroughfares at grade that are much frequented and where the local conditions tend to prevent the traveler from readily seeing such trains, then it is the duty of the rail-road company to either slacken its speed or else to maintain safeguards at such crossings to protect the public.

That defendant in error recognized that such an obligation rested upon it is shown by the fact that it had attempted to meet it by installing a mechanical, automatic contrivance which was designed to ring a gong at the crossing. This contrivance, counsel have been pleased to say, was "safer and more dependable than a flagman or watchman could be, for the reason that the element of human frailty, inattention, mistakes and carelessness is eliminated."

It appears that a mechanism was installed 1,220 feet north of the Riverton crossing, which had an electrical connection with the bell on the post, and the shoe of the southbound train would engage this mechanism, thereby cutting in an electric current that set the gong ringing.

It is contended that there was no positive testimony that this gong did not ring as the colliding car passed over the crossing.

Mr. Adams, a witness for defendant in error, who had charge of the bell in 1911, upon cross-examination, reluctantly admitted that he recalled on two occasions during that time that it had failed to operate (Rec. 116).

O. C. Thompson, a merchant and disinterested witness residing at Riverton, stated: "I have observed, during the year 1912 and before this accident, irregularities and failures of this gong to ring when a train was approaching. At times the bell would not ring at all when a train was approaching or otherwise, and at other times it would ring when there was no train coming or otherwise." (Rec. 234.) "I actually observed quite a number of times, between the first day of January and the 25th day of July, 1912, the southbound train approach when the bell failed absolutely to ring, but I could not state definitely how many times." (Rec. 235.)

Counsel for respondent in error refused to permit us to show by Mrs. Springer (Rec. 67) and by the witness, Mr. East (Rec. 81), that this same gong had failed to operate when approaching trains passed it prior to this accident.

Mr. East, a disinterested, matured witness, engaged in a mercantile business, and who was thoroughly familiar with this crossing, was driving towards it at the time of the accident and was within 50 feet of the gong or bell when the collision took place. This bell was 12 inches in diameter and could be heard from 700 to 900 feet. He states: "The alarm gong there at the crossing was not ringing. I am positive of that." (Rec. 79.) "I stood right there under the bell, and if it had been ringing, I would have heard it." (Rec. 84.) He further stated, on cross-examination, respecting this gong: "I know that it does not always start it, and as for stopping it, it could not have stopped if it was not started. I know they don't always ring." (Rec. 85.)

Mr. Lamb, another disinterested witness, whose only crime was that of being a friend of Mr. Brodnix, was standing on the platform at the time of the accident waiting for a nothbound car, and saw the fated southbound car as it left Quarry, and came on by Allentown to Riverton. He also observed the automobile approaching and was observing this gong or bell, as he was only 75 feet from and in full view of it. He states: "The electric gong maintained at the crossing did not ring at that time." (Rec. 90.)

Mr. Herpick, a witness for defendant in error, testified that he was a passenger on this train; that when the train was about 50 feet from the crossing, he was sitting on the side of the car next to the gong, with his head out of the window (Rec. 203), and he states: "I did not hear the electric bell ring as we passed over the crossing" (Rec. 200), and yet his head must have been within ten feet of this bell, which, if ringing, could have been heard at least 800 feet.

Mrs. Springer, who was within 25 feet of this gong when the accident occurred, stated that she did not hear it ring, and that if it had rung she could have heard it, and this is corroborated by Trena Brock. All of these are disinterested witnesses. This is certainly positive testimony and would support a finding of the jury that the gong did not ring.

This testimony is supported by that of Mr. Brodnix, the chauffeur, who was actively and attentatively listening for any sounds that might indicate the approaching train, and also by Mrs. Lyford, who was riding in the automobile.

It is urged by counsel that Mr. Brodnix testified at the coroner's inquest that he heard the bell ringing. The colliding train was in charge of R. W. Robson, who testified, at the coroner's inquest, held the next day after the accident, as follows, regarding the alarms that he gave as the car approached the crossing:

"Q. You had a bell?

A. Yes.

Q. You didn't ring that?

A. Yes.

Q. You were ringing your bell?

A. I was ringing my bell when I hit the automobile." (Rec. 215.)

And at the trial the witness would not state that this testimony was incorrect.

At the same inquest, Mr. Brodnix testified that as he approached the crossing he saw the train:

"Q. Did you hear the gong or see the train first?

A. I saw the train first.

Q. And after you saw the train, you heard the gong?

A. Yes." (Rec. 57.)

As he was within 30 feet of the gong before he saw the train it could not have been the electric gong on the post that he heard, but it was the gong on the car, being rung by the motorman, and it is not at all surprising that the rapidity of events, their consequences, and the mental shock therefrom did not enable him to locate correctly the gong that he heard.

Opposed to this testimony are the self-serving declarations of those in the direct employ of defendant in error, with the exception of Mrs. Nelson, Mr. Brown, Mr. Somerfield and Mr. Apt, and none of these witnesses testified that their attention was particularly directed at the time to this gong, and some of the other witnesses for defendant in error, who were aboard the train, stated that they did not hear the gong. Mrs. Nelson, Mr. Brown, Mr. Somerfield and Mr. Apt would have no motive in misrepresenting or coloring their testimony; they have no form of employment to protect, and no reputation to shield; they may have heard a gong ringing at the time, but it was the gong on the car that Mr. Robson was ringing which they heard. As a corroborative feature of defendant's testimony, it sought to show that the gong must have rung when this car passed the crossing for the reason that it rang as the other cars afterwards passed by. It will be remembered that the gong is set in motion by a shoe on the car which works with the mechanism north of the crossing. It will be observed that respondent in error was very careful not to offer any evidence that this mechanism on the car was in proper condition; nor did it offer any evidence that the bell always rang when this same car was southbound over this crossing. If the gong was not set in motion by the approaching car, then, of course,

it would not cut it off, when it passed the crossing, as there was nothing to cut out. Inasmuch as there was proof showing that the bell did not ring, and that the contrivance and car to which it was attached were under the control of respondent in error, then the burden of proof was upon respondent in error to show that the contrivance or shoe on this particular car was in perfect working condition. When we recall the great fidelity to detail with which this case was tried by defendant in error we must assume there was but one reason why the condition of the engaging device on the colliding car was not shown.

It is further contended that there was no proof that the whistle was not blown as the colliding car was approaching the crossing. Any warning from the approaching car should have been made under such conditions, and sufficiently timely and near to the crossing to have in fact been a means of warning. Both the deceased and Mr. Brodnix looked and listened for any sounds either whistle or rumble of any approaching car. Their attention was thereby directly fixed on that subject. They heard no whistles or other sounds from the approaching car.

Mrs. Lyford, who was in the automobile, testified that she heard no whistle.

Mr. East, who was also approaching the crossing to pass over it and interested in knowing if there was any approaching train, listened for any whistles or other alarm signals. His attention was thereby directly given to this matter. He heard no whistle (Rec. 79).

Mr. Lamb, heretofore referred to and who saw the train as it came from a point beyond Allentown, heard no whistle, and yet he was looking at and watching this identical car.

What testimony outside of the self-serving declarations of the employees of the defendant in error actually conflict with the foregoing evidence? Except for the motorman there was no testimony on behalf of respondent in error, by any witness, to the effect that they were paying particular attention to or listening for whistles. Mr. Gribben states that the crossing whistle was given at about 3,000 feet north of the crossing (Rec. 218). He further states that he heard no other whistles afterwards.

Allentown was about 1,250 feet north of the Riverton crossing and Quarry, which is at the rock quarry, was another station about 2,000 feet north of that, so that Quarry was about 3,250 feet north of Riverton.

The witness Brown, referred to by counsel, stated: "I heard the whistle blow after we passed the rock quarry, and heard it again when we struck the auto, but I observed no whistles blowing between that time and the time that I heard them up at the quarry." (Rec. 133.)

Respondent in error relies on the testimony of its witness, Mr. Somerfield, but his testimony, with reference to the whistles, was to the effect that he heard the whistles, consisting of four or five blasts, at the crossing when the accident occurred, and before that he had heard the regular crossing whistle, but he did not know whether it was before or after they crossed the Duwamish bridge, which was still farther away from the crossing than Quarry (Rec. 137).

The motorman blew the car whistle when he first saw the auto, which was from 50 to 80 feet before it reached the crossing.

Mr. Rosenberg, an employee of defendant in error, stated that he heard only one whistle from this car, consisting of four blasts, when the car was about 200 feet away (Rec. 143). This must have been the whistles that were given by the motorman when he discovered the automobile.

The testimony of Mr. Overlock is offered as conclusive proof that the whistles were blown. He does not claim that he was waiting or listening for or paying any particular attention to the whistle, and at one point in his testimony states that the whistle might have been blown before they passed Allentown. After the car stopped he went back to the crossing and was there an hour. During that time at least two trains came in and several witnesses testified to the gong ringing, yet he did not hear it (Rec. 122). He further testified that the macadam top of the road was gone and there was no pitch on it (Rec. 122). Although from other testimony it appears that the road had received a new pitch and screening top but a few weeks before. All of which indicates that his evidence is largely conjecture.

We cannot fail to call attention to the remarkable evidence of the conductor, Gribben. He states that while he was pursuing his usual duties in collecting fares, he heard the regular whistles. He then proceeded with his work, and entered the front vestibule about the time that the motorman discovered the approaching automobile. He did not hear the whistles that the motorman was then blowing, although he states that the blowing of a whistle at that time was an unusual occurrence and he was

directly under it. Yet he claims to have heard the alarm gong ringing as he passed the crossing.

Having in mind all these conditions, it can be said that none of the authorities cited by counsel for respondent on page 39 of their brief have any application to this case.

In the case of Northern Pacific Railway vs. Freeman, 174 U. S. 379, cited by counsel in support of another point, this language is used by Justice Brown:

"There was testimony from several witnesses in the neighborhood tending to show that no whistle was blown by the engineer as the train approached the crossing. There was also the testimony of the conductor, engineer and fireman that the whistle was blown. As the majority of plaintiff's witnesses were so located that they would probably have heard the whistle if it had been blown, there was a conflict of testimony with respect to defendant's negligence, which was properly left to the jury."

Here we have the evidence of at least three witnesses whose attention was particularly directed to ascertain if the whistles on any approaching car were being blown, all affirming that no whistles were blown. Consequently, this case falls within the exceptions specified in *Keiser vs. Railway Company*, cited by counsel. In addition we have the testimony of the other witnesses who state they did not hear it.

The statement of the facts alone in *Culhane vs.* Railway Company, wherein it appears that two witnesses for plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal, clearly distinguishes that case from the one at bar.

In Horn vs. Railway Company, cited by counsel, there were no witnesses who denied that the whistle was blown, but some merely stated that they did not hear it and were some distance away.

We believe that a fair interpretation of the evidence, with reference to the subject of these whistles, is that the whistle was blown 3,000 feet, or more than a half mile, north of Riverton. It is within the common knowledge of every one that the air whistle on an electric car cannot be heard nearly so far as a steam whistle, and when we have in mind that a traveler approaching the crossing from the west would have his view obscured by the intercepting bluff until he came within a short distance of the crossing, and the further fact that the bank deflected the sound, we do not believe that even counsel will contend that a whistle blown 3,000 feet. or over a half mile, north of this crossing, by a car running 35 to 40 miles an hour, is a timely signal or warning of the train's approach. It goes without saying that any signal or whistle to be effectual must

be given sufficiently near to this crossing to afford a warning to one approaching the crossing from the west. If, in considering the testimony relating to the giving of the whistle on this car, we eliminate the self-serving testimony of the employees of defendant in error and also bear in mind that the attention of the witnesses for defendant in error was not directly concentrated at the time on the matter of the whistles, while the tesimony of nearly all of the witnesses for plaintiff in error was at the time directed toward ascertaining if any whistles were being blown, we cannot escape the conclusion that the preponderance of the testimony established that no warning or timely whistles were blown.

We, therefore, submit that the testimony was abundant, if not conclusive, that defendant in error was guilty of negligence in the operation of this car, which was the cause of Dr. Rininger's death.

### DR. RININGER AND HIS CHAUFFEUR NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

In presenting this phase of the controversy, counsel have again been very unfair in their statement of the evidence in the record. Inasmuch as

this court will read the testimony, we shall not attempt to point out all of the glaring inaccuracies or garbled statements in their brief.

At the risk of repeating to some degree the statements contained in our opening brief, we feel obliged to call the court's attention to a few facts before discussing the authorities presented by counsel. The conditions at this crossing were unusual and extraordinary. First, there is a bluff which comes to a point on the west side of the tracks and near the crossing and a traveler approaching the crossing from the west cannot see an approaching car from the north until he is within a short distance of the track. This bluff continues northward on a curve contiguous and parallel to the tracks for a distance of over 2,000 feet. It is a precipitous bank and is a sounding-board deflecting the rumble and whistles of approaching cars to the east, thereby rendering it difficult for one approaching the crossing to hear the approaching car until it is directly at the crossing. Furthermore, as the eastbound traveler passes the point of the bluff described, he readily sees both of the tracks at Allentown and for perhaps 200 feet south and also several hundred feet north of that point, and he can see the east track nearly all of the way. Yet at that moment a southbound car can be approaching the crossing within

from 200 to 800 feet and not be visible, and none of these misleading conditions are observable. Consequently, for any increased duty on the part of the traveler to use his senses to ascertain any apparent dangers, there is a corresponding increased duty on the part of the railway company to exercise greater caution in operating its trains over this crossing to avoid these unseen dangers to the public. Where there are unseen dangers or dangers that are not apparent to the ordinary observer, one cannot be expected to guard against them, but where the dangers are known or are plainly observable, then one must exercise reasonable prudence and diligence to avoid such apparent and known dangers. Having these principles in mind, we will consider the various cases cited by counsel, and it will be seen that none of them announce a different rule than that shown in our opening brief.

In Railroad Company vs. Houston, 95 U. S. 697, the deceased lived in a house adjoining the railroad tracks for some time, and from her house there was a clear view of the tracks to the west for a distance of three-fourths of a mile. While she was crossing this track on the private right-of-way of the railroad company, where she had no right to be, on a clear moon-light night, a train from the west, with a bright headlight on the engine and the train

itself creating a loud noise, struck her, causing her death. The court says: She was bound to look and listen before attempting to cross the tracks in order to avoid the approaching train, and had she used her senses she could not have failed to both hear and see the train which was coming. Nowhere in this decision is it suggested that she should have *stopped* to look and listen.

In Schofield vs. Railway Company, 114 U. S. 615, the traveler, in the afternoon, attempted to cross a right-of-way track that he was familiar with, which was in a flat country where there were no cuts, and for 600 feet before he reached the track he had a clear view of it for 70 rods or 1,150 feet, or nearly a quarter of a mile, and was injured by a passing train. From these facts, the court concluded that the traveler had failed to look and so failing was negligent. There was no intimtaion that he should have stopped for the purpose of looking.

In Northern Pacific R. R. Co. vs. Freeman, 174 U. S. 379, the evidence showed that the deceased drove his team toward the crossing with the train in full view, with his head down, and that he looked neither way for the train, and from these facts the court concludes that he neither looked nor listened for the train, and failing so to do was negligent.

In Horn vs. Railroad Co., 54 Fed. 301, the deceased was approaching the crossing in a close covered wagon, which prevented him from seeing approaching trains. The pith of the decision is found in the following sentence (p. 305): "The only inference that can be drawn from these facts is that the deceased neither heard nor saw the coming train, nor did he make any attempt to do so."

In Shatto vs. Railroad Co., 121 Fed. 678, we find that the cause of action arose in Pennsylvania under a very peculiar state of facts. In Pennsylvania, the rule is absolute that one must stop before attempting to pass a crossing. This rule is not observed outside of that district. C. N. O. & T. P. Ry. Co. vs. Farraw, 66 Fed. 496, previously cited by us.

In the statement of the facts in Davis vs. Railway Co., 159 Fed. 10, it was admitted that the crossing was a dangerous one; that plaintiff knew of all of such dangers; also knew that the natural conditions surrounding the crossing would prevent him from seeing or hearing the approach of a train, and that no appliances were employed by the railroad company to warn travelers of approaching trains. The statement of these facts disclose that that case is not at all parallel with or an authority for the case at bar.

In  $Erie\ R$ . R.  $Co.\ vs.\ Schultz$ , 173 Fed. 759, the court says (p. 761):

"It seems clear from the record that he drove upon the tracks, and that he continued to advance absorbed in meditation until his horses were almost up to the track, on which the engine was coming from the east, if they were not already upon it, when he was aroused to his peril by the shout of a man nearby."

It also appears that the watchman at the crossing attempted to warn the injured man of his peril, but he was so absorbed that he failed to hear him. This is such a flagrant case of failing to look and listen as hardly to be cited as an authority in this case, and yet in reversing the case on a question of instructions, it is said: "The trial court was not justified in giving a directed verdict for the company."

The case of Brommer vs. Railroad Co., 179 Fed. 577, arose in the Third Circuit where the Pennsylvania rule applies. This rule requires one approaching a railroad crossing, under any and all circumstances, to stop, look and listen. We have pointed out in our opening brief that this rule does not obtain outside of that circuit. This decision, as well as the one of N. Y. C. vs. Maidmount, 168 Fed. 23, were written by Judge Buffington, and stand alone. Other courts have refused to follow his reasoning, as we have heretofore pointed out.

In C., M. & St. P. Ry. Co. vs. Bennett, 181 Fed. 789, we find that Bennett was riding on the rear end of his wagon so that he could not see an approaching train until his horses were within one foot of the track, because of obstructions. He had lived for years in the vicinity of this crossing, and was perfectly familiar with its surroundings and all of its dangers, and knowing that he could not see the tracks until his horses reached them and also knowing that the noise of the grinding brakes on the wheels in addition to the noise of the wagon and the horses' feet, would prevent him from hearing, it was held that he had to rely entirely on his sense of hearing, hence should have stopped. If it had appeared when within 60 feet of the track, he could have seen them 1,200 feet away, under circumstances that would lead a cautious man to assume that he could see an approaching train for the entire distance, the court would not have reached the same conclusion.

In Grimsley vs. Northern Pac. R. R. Co., 187 Fed. 587, plaintiff was driving in a town on a public street across a main and a side track. A freight train was standing on the side track. It was a cold, clear day and the engine was emitting clouds of steam and smoke which the wind carried across and over the main track, thereby obscuring the

eastern view of such track for 300 or 400 feet. Some box cars and structures also aided in obscuring this view. The plaintiff wore a cap pulled down over his ears and a fur-lined overcoat, the collar of which was turned up to the bottom of his cap. Plaintiff crossed the side track, passed the freight train, and was proceeding to cross the main track when an express train emerged from the east out of the smoke and steam at a high rate of speed. The court declares that he failed to use his senses of hearing and seeing. Great stress is laid on the fact that before he reached the main track, he could have seen that the view of it was obscured by the smoke and steam of the freight engine, and that such obstructions were not continuous, but were intermittent and temporary, only rising and falling with the wind. There was nothing that could have misled the deceased. He simply failed to look and listen.

In Northern Pac. R. R. Co. vs. Alderson, 199 Fed. 735, plaintiffs were driving towards a railroad track in a level country, and as they approached the track the view of it became more or less obscured by growing brush and other obstructions. The plaintiffs were on the lookout for trains and when within 20 or 30 feet of the tracks stopped and listened. Consequently, in considering the case, the

matter of whether the plaintiffs did or did not stop before proceeding across the track was not a point in the case and not essential to the decision, and it cannot be assumed that the language of the court was intended to announce a rule contrary to that stated in *Ives vs. Grand Trunk Ry. Co.* and analogous cases, but on the contrary it clearly was the intention of the court to follow the doctrine of those cases, for it is said (p. 740):

"We think under the testimony the care and diligence, with which Alderson and wife approached the track before driving upon it, was clearly a question for a jury, and it was not error for the court to leave it to them. This as it respects counsel's theory of an obstructed vision."

In Bowden vs. Walla Walla Valley R. R. Co., 79 Wash. 184, the respondent was approaching the track in an automobile at 20 miles per hour. He was thoroughly familiar with the crossing as he passed over it every afternoon. At a point 100 feet from the track, an approaching car could be seen from 200 to 300 feet away. The top of the automobile was up and so were the side curtains. When respondent was within 150 to 175 feet of the track, he looked both ways but saw no car, but did not look or listen again for approaching cars, but reduced the speed of his automobile to 15 miles per hour. A witness for him, who was on the car.

testified the he saw the automobile approaching the crossing, and that respondent was not looking toward the car and seemed to be unconscious of its approach. The court concludes that respondent failed to look or listen for the car and was, therefore, guilty of contributory negligence. It will be further observed that this case does not declare that the driver of an automobile must stop to look or listen, nor does it hold that approaching the crossing at 15 miles per hour was an excessive rate of speed.

In Cable vs. Railway Co., 50 Wash. 610, Judge Root states:

"It is the rule in this, as in most states, that a person about to cross the track of a steam railway must stop, look and listen, unless the conditions be such that to do so would avail nothing."

And then declares that the same rule should apply to interurban railways. A careful examination of the decisions of the State of Washington fails to find sufficient warrant for Judge Root's declaration, but in fact it would appear that a contrary rule prevails.

N. P. R. Co. vs. Holmes, 3 Wash. 543; Ladouceur vs. N. P. R. R., 4 Wash. 38; also Ladouceur vs. N. P. R. R. Co., 6 Wash. 280; Baker vs. Tacoma Eastern Ry., 44 Wash. 579. In *C., G. W. Ry vs. Smith,* 141 Fed. 930, a pedestrian was killed by a backing engine, because he did not look to see if there were any danger. Had he done so, the "locomotive was in such plain view that its approach would have been disclosed by a mere glance along the track in that direction." His failure to *look* for danger was held contributory negligence.

In Neininger vs. Cowan, 101 Fed. 787, plaintiff was injured at a railway crossing in the City of Wheeling. He had been thoroughly familiar for years with all of the conditions surrounding the crossing, passing it nearly every day, and there were two ways for passing the tracks, one of which was practically free from danger, and the other more hazardous, and he chose the more hazardous course. When he assumed to adopt the more hazardous route with knowledge of all of its dangers, then there could be no plainer case than in applying the rule that he should exercise such due care and diligence as would be expected of a reasonably prudent and careful man under similar circumstances to stop, look and listen.

We believe that this analysis of the cases submitted by respondent in error discloses that none of them are in conflict with the rule in *Ives vs.* 

Grand Trunk Ry. Co., or with the various cases heretofore presented to your attention by us. The facts in none of the cases are parallel with the case at bar. They all proceed upon the express theory that the traveler had full knowledge of all of the dangerous conditions surrounding the crossing, and in order to properly avoid all of such known dangers, the traveler failed to exercise such due care and diligence as would be expected of a reasonably prudent and careful man under similar circumstances.

For the purpose of making it conclusively appear that Dr. Rininger was negligent as a matter of law, a laborious attempt has been made to demonstrate that Dr. Rininger's automobile was approaching the crossing at a speed of 30 miles per hour when the electric car appeared. This is based chiefly upon what counsel is pleased to term "expert" testimony. One of these experts is Mr. Overlock, a banker at the Town of Kent, who states hypothetically that if an automobile weighing 4,500 to 5,000 pounds should skid with locked wheels on a road without any asphalt or pitch and rock screening top for 35 to 40 feet, it must have been going 30 miles per hour. He admits that he never drove or owned an automobile of that size (Rec. 123) and had never seen an automobile weighing 5,000 pounds skidding with locked wheels (Rec. 128).

Another "expert" witness, Mr. Taylor, who likewise stated hypothetically that if an automobile of the size and weight, and under the conditions just stated, should skid with locked wheels for 39 feet, he would judge that it was going at 30 miles per hour. He further stated that one could always make an automobile skid at any speed over 10 miles per hour (Rec. 181).

Mr. DeJarlius, also, stated that if, under such conditions, the automobile skidded 39 feet, it was going 30 to 35 miles per hour, and that an automobile would not skid at all unless it was going over 20 miles per hour.

Mr. Stabler, an employee of one of the defendants, evidently desiring to emphasize this point for his employer, stated that if it only skidded 30 feet, it must have been going 30 miles per hour.

It will be observed that this "expert" evidence was based upon the statement that wheels skidded 39 feet.

The only man who gave any reliable testimony as to the length of those skid marks, and who in fact was the only man who actually measured them on the day of the accident, was the well-known attorney, W. H. Morris, an entirely disinterested person, who says these marks were 21 to  $21\frac{1}{2}$  feet

(Rec. 230). Consequently, this expert evidence is of no value, as it was based on a wrong hypothesis.

Mr. Krandall, a disinterested witness, who has been driving and operating automobiles since 1903, and who was familiar with Dr. Rininger's automobile, and who was just as credible and whose testimony was entitled to just as much weight as witnesses for defendant in error, demonstrated that it was not practical to ascertain the speed of an automobile from its skid marks (Rec. 236).

Mr. Lamb, an experienced man, not interested in selling automobiles to the defendant,—in fact he was entirely disinterested,—and whose testimony is worthy of the highest credence, and who saw the collision, states that a Stearns automobile weighing 4,500 to 5,000 pounds, running at the speed he estimated that it was going, which was 12 to 15 miles per hour, under the conditions that then existed at Riverton, could not be stopped under such an emergency within 20 to 25 feet (Rec. 92).

But it is pointed out that Charlie Sharp, a boy only fourteen years old when he saw this collision and who was quite friendly with one of Mr. Rosenberg's boys, who never drove an automobile and had ridden in one only once or twice and who frankly stated that he could not very well tell the rate of speed that it was traveling, testified, eighteen months after the occurrence, that he thought that the automobile was going 25 or 30 miles. He says, on cross-examination, that he bases this estimate on the skidding which he says was 40 feet. It is hardly expected that rights of parties should be determined by such unreliable testimony.

But reinforcements are sought from the testimony of Archie Apt, who has followed dairying and farming all his life. He states that the only experience in measuring distances that he had was in stepping off spaces for fence posts. He was on the car looking out of the window and when 50 feet from the crossing, he saw the automobile. As the electric car was traveling faster than fifty feet per second of time he could not have had time to more than glance at the automobile from the window. He says that he had not had any experience in judging the different rates of speed at which automobiles run. Should any court accept his estimate of the speed of this automobile made under such circumstances?

While Mrs. Rosenberg says the automobile "was going fast," Mrs. Springer says it was not running fast (Rec. 64).

Is it reasonable to say that the sum of this "expert" testimony, with its unreliable reinforce-

ments, is sufficient to overcome the positive testimony of the eye witness who saw the automobile as it approached the tracks, regarding its rate of speed? But all of counsels' argument to substantiate a high rate of speed for this automobile when the car struck it only demonstrates more clearly the error on the part of the trial court in assuming to determine this fact from the conflicting testimony.

We again repeat that it cannot be said that all men with reasonable minds would reach the conclusion that Dr. Rininger and his chauffeur did not act in the light of their knowledge of the conditions and surroundings of this crossing and its dangers as were apparent to them as prudent men would reasonably act for their safety under similar conditions, and that this question should have been submitted to the jury for its determination.

Respectfully submitted,

H. H. A. HASTINGS,L. B. STEDMAN,Attorneys for Plaintiff in Error.

# In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

M. G. HENRY,

Plaintiff in Error,

VS.

TACOMA RAILWAY & POWER COMPANY, a corporation,

Defendant in Error.

## TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Western District of Washington, Southern Division

JUL 29 1914

F. D. Monckton,



# In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

M. G. HENRY,

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VS.

TACOMA RAILWAY & POWER COMPANY, a corporation,

Defendant in Error.

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Upon Writ of Error to the United States District Court for the Western District of Washington, Southern Division

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#### Names and Addresses of Attorneys

- ANTHONY M. ARNTSON, Esquire, 614 Fidelity Building, Tacoma, Washington, and
- T. W. HAMMOND, Esquire,614 Fidelity Building, Tacoma, Washington.Attorneys for the Plaintiff in Error.
- JOHN A. SHACKLEFORD, Esquire, Perkins Building, Tacoma, Washington, and
- FRANK D. OAKLEY, Esquire,
  Perkins, Building, Tacoma, Washington,
  Attorneys for the Defendant in Error.

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff in Error,

VS.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant in Error.

### Praecipe for Transcript

To the Clerk of the Above Entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error to said Court, including the following pleadings, proceedings and papers, to-wit:

Complaint;

Order approving bond and removing cause to United States District Court;

Answer to complaint;

Reply to answer;

Verdict;

Judgment;

Petition for new trial (not affidavits);

Stipulation continuing hearing on petition for new trial;

Bill of Exceptions as settled by the court, with order settling same;

Defendant's Exhibits A, B, C and G;

Assignment of Errors;

Petition for Writ of Error;

Order allowing Writ of Error;

Bond on writ of error and approval of same; Writ of Error;

Citation;

And all admissions of service and endorsements on same.

Also Clerk's certificate.

ANTHONY M. ARNTSON,
T. W. HAMMOND,
Attorneys for Plaintiff in Error.

(Endorsed):—

"FILED IN THE U. S. DISTRICT COURT

Western District of Washington, Southern Division, JUL 22 1914

FRANK L. CROSBY, Clerk. By E. C. Ellington, Deputy."

In the Superior Court of the State of Washington, for the County of Pierce.

M. G. HENRY,

Plaintiff,

VS.

Cause
No. 33941

Dept.
No. \_\_\_\_\_

COMPANY, (a corporation),

Defendant.

#### Complaint

The plaintiff, M. G. Henry, complains of the defendant, Tacoma Railway and Power Company, and alleges:

I.

That at all the times hereinafter mentioned the defendant was and that it now is a corporation, having its principal office and place of business in the city of Tacoma, in Pierce County, State of Washington, doing business as a common carrier of passengers for hire, and as such operating, through its servants and employees, a system of street railways in said city, including a line on Pacific Avenue at and past its intersection with south twenty-first street, under and by virtue of franchises granted by said city.

#### II.

That on the sixth day of April, 1911, at about the hour of eleven o'clock, A. M., one of the defendant's

passenger cars then in use in defendant's said business, was brought to a stop and held stationary for some seconds of time at its usual stopping place at said intersection of Pacific Avenue and twenty-first street, for the purpose of permitting several passengers, including the plaintiff, to enter. That as soon as said car was so stopped the plaintiff proceeded to enter it, and that his intention so to do was at all of the times herein mentioned known to the defendant's employees in charge of said car, or would have been so known to them had they exercised due care in the operation of said car. That said car was of unsafe construction, in that the entrance was in the middle thereof, and in front of the rear trucks.

#### III.

That as the plaintiff was so entering said car climbing upward on the steps thereof with one hand grasping a hand-hold thereon, said car was, by and through the carelessness, negligence and incompetency of the defendant's servants and employees, knowingly and negligently intrusted by said defendant with the operation thereof, started forward with a sudden jerk, without any warning to the plaintiff, whose position as above described was then known to the defendant's said servants and employees, or would have been known to them had they exercised due care in the operation of said car.

#### IV.

That the starting forward of said car, as aforesaid, was wholly unexpected by the plaintiff, and caused him to lose his balance and footing, and swung him around and off his feet, and struck his head and body violently against the side of the car, with such force as temporarily to deprive him of the control of his faculties. That in an instant, and before the plaintiff was able to realize his predicament or to release his hold of said hand-hold or to take any action for his own protection, his body was, by the continued forward motion of said car, swung inward, toward the rear trucks of said car, close to the track rail; and that in order to avoid great injury it became necessary for the plaintiff to retain his hold on said hand-hold and to drag himself back upon the steps of the car; and that such course appeared to the plaintiff to be necessary to avoid the impending danger.

#### V.

That the plaintiff, in a dazed condition resulting from said blow and the shock of said accident, and in the face of the imminent danger aforesaid, retained his hold upon said hand-hold and attempted to regain his footing on the steps of said car, in an effort to save himself from further injury, and after struggling for several seconds did succeed in regaining said steps, and, climbing them, entered said car.

#### VI.

That from the time said car so started forward until the plaintiff regained said steps, as aforesaid, said car, by the carelessness and negligence of the defendant's said servants and employees, continued its forward movement, with ever increasing speed,

dragging the plaintiff along the rough pavement and making it impossible for him to gain a footing upon the pavement; that during all of said period the plaintiff's situation as above described was well known, or by the exercise of reasonable care, caution or diligence would have been known, to the said servants and employees of the defendant, and that by the exercise of reasonable diligence and care the said servants and employees of the defendant could, during said period, have stopped said car, and thus have enabled the plaintiff to release his hold and drop to the pavement without danger of being run over by said wheels or trucks.

#### VII.

That said accident, and the shock and strain incident thereto, caused ruptures in the plaintiff's stomach and intestinal tract, and severe injuries to his head, shoulder, arm, side and back, and various painful bruises and contusions, and resulted in the permanent derangement of his nervous system and of his digestive organs, and a serious disturbance of the control over his vital organs, and an impairment of his hearing, and other serious injuries. That by reason of said injuries plaintiff has lost the capacity for enjoying the usual pleasures of life; that the outward manifestations of his said afflictions attract the attention of the curious, and make him an object of pity, and even of ridicule and subject him to humiliation, vexation and annoyance; that at all times since said accident the plaintiff has suffered great physical and mental pain and anguish by reason of said injuries, and his condition of health resulting therefrom, and that he must during the remainder of his life continue so to suffer; all as the result of defendant's negligence, as herein alleged.

#### VIII.

That at the time of said accident and injury the plaintiff was a man forty-two years of age, of robust health and strength, with a natural expectation of life of twenty-six years. That at said time he was employed as a bond buyer and office man at a monthly salary of one hundred dollars, with a certainty of early advancement and increase in pay and capable of earning a much larger salary. That at said time he had an extensive and intimate knowledge of the business of buying and selling bonds, mortgages and other securities, and of all the intricacies of the business of a financial agent or banker, and possessed especial skill in such business, and that at said time he had and that he has since had (subject to the condition of his health) opportunities to engage in said business as a principal, with a certainty of profits greatly in excess of the salary above named. That during most of the time from the time of said accident to the first day of August, 1911, the plaintiff reported for work and did such work as he was able to perform, in order to retain his said position, although constantly in great pain. That by reason of said injuries and his condition resulting therefrom as herein described he was unable at any time during

said period to perform his work in a satisfactory manner, as theretofore, and that on said first day of August, 1911, by reason of his condition of health, resulting from said injuries, he was discharged from his employment. That since said first day of August, 1911, he has been unable to hold any position, but has attempted to assist in conducting a business such as above described, for the support of his family and himself, but that by reason of his rapidly failing health, caused by said injuries, he has been and is and will be unable to perform the labor and duties necessarily devolving upon him in connection therewith, and that as a result of his said condition his personal efforts are unprofitable, and it will be impossible during the balance of his lifetime for him to perform any labor or to hold any employment or to conduct any business or to earn any money for the support of his family or himself.

#### IX.

That from the time of said accident to the time of the commencement of this action said plaintiff has incurred reasonable expenses for medical services and attendance, medicines and incidental expenses, all of which have been rendered necessary solely by reason of said injuries, to an amount aggregating \$570.00, and that it will be necessary during all the balance of his life to expend large sums of money for additional medical and surgical services and attendance and medicines.

#### X.

That the dragging of the plaintiff's body along the pavement by said car, as above described, destroyed the plaintiff's overcoat, which was then of the reasonable value of \$35.00, and also caused to be thrown from the plaintiff's pocket and lost the plaintiff's gold watch, which was then of the reasonable value of \$50.00, and the plaintiff's fountain pen, which was then of the reasonable value of \$5.00.

#### XI.

That all of said injuries, and all of said humiliation, pain and suffering, physical, nervous and other impairment and derangement, loss of earning capacity, and other losses, expenses and disbursements above described, have resulted and will result to the plaintiff wholly from the carelessness, negligence and fault of the defendant, in the use of said car of unsafe construction, and in the employment of said incompetent servants, and the careless and negligent acts of said employees and said defendant, and otherwise, as aforesaid; and that the plaintiff has been damaged thereby in the full sum of Fifty Thousand Dollars.

WHEREFORE plaintiff prays judgment against the defendant in the sum of Fifty Thousand Dollars, and for his costs and disbursements herein, and for such other and further relief as to the Court may seem just.

M. G. HENRY,
Plaintiff.

#### ANTHONY M. ARNTSON,

Attorney for Plaintiff.

P. O. Address: Room 614 Fidelity Bldg., Tacoma, Pierce County, Washington.

# STATE OF WASHINGTON SS:

M. C. Henry, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing Complaint, that he knows the contents thereof and that he believes the same to be true.

#### M. G. HENRY.

Subscribed and sworn to before me this 26th day of November, 1912.

#### ANTHONY M. ARNTSON,

Notary Public in and for the State of Washington, residing at Tacoma, in said County.

Filed in Superior Court.

Nov. 27, 1912.

E. F. McKenzie, Clerk.

By G. F. M. Deputy.

"FILED

U. S. DISTRICT COURT

Western District of Washington

JAN 17 1913

FRANK L. CROSBY, Clerk E. C. ELLINGTON, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

VS.

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

# Order Approving Bond and Removing Cause to United States District Court

This cause coming on duly and regularly to be heard this 19th day of December, 1912, upon the petition of the defendant, Tacoma Railway & Power Company, for the removal of this cause from this Court to the United States District Court for the Western District of Washington, Southern Division, and it appearing to the Court that written notice of this Petition and hearing and of the Bond for removal filed herein has been given to the plaintiff herein prior to the filing of said petition and Bond, and it appearing to the Court from said petition that said suit is entirely between citizens of different states, and that the amount in controversy in said action exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3000.00), and the petitioner having filed and tendered with their said petition a Bond with good and sufficient surety in the sum of Five Hundred Dollars (\$500.00) conditioned as required by law, and being advised in the premises,

IT IS ORDERED, that this court proceed no further in this cause, and that the same be and hereby is removed to the District Court of the United States for the Western District of Washington, Southern Division, and that the Clerk of this Court be and he hereby is ordered and directed to prepare a record herein and to certify and transmit the same to the Clerk of the United States District Court for the Western District of Washington, Southern Division, within thirty days from the date of the filing of said petition.

DONE in open Court this 19th say of December, 1912.

ERNEST M. CARD,
Judge.

Ent'd Jour. 133 Page 525 Dept. 4 12-19, 1912.

Filed in Superior Court.
Dec. 19, 1912.
E. F. McKenzie, Clerk.
By J. J. E. deputy.

"FILED
U.S. DISTRICT COURT
Western District of Washington
JAN 17 1913
FRANK L. CROSBY, Clerk.
E. C. ELLINGTON, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

VS.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

#### Answer

The defendant for answer to the complaint of the plaintiff filed herein, alleges and says:

T.

For answer to paragraph two of the said complaint, defendant admits that on or about the 6th day of April, 1911, at 11:00 o'clock A. M. of said day, one of defendant's passenger cars, then in use in defendant's business, was brought to a stop and held stationary for some seconds of time at its usual stopping place at said intersection of Pacific Avenue and 21st street, for the purpose of permitting passengers to enter the same, but this defendant denies each and every other allegation in said paragraph contained.

#### II.

For answer to paragraphs three, four, five, and six of said complaint, this defendant denies the same and each and every allegation therein contained.

#### III.

For answer to paragraph seven of said complaint, this defendant says it has no knowledge or information sufficient to form a belief as to the facts therein contained and therefore denies the same.

#### IV.

For answer to paragraph eight of said complaint, this defendant says it has no knowledge or information sufficient to form a belief as to the facts therein alleged and therefore denies the same.

#### V.

For answer to paragraph nine of said complaint, this defendant says, it has no knowledge or information sufficient to form a belief as to the facts therein alleged and therefore denies the same, and particularly denies that plaintiff has been damaged in or expended the sum of \$570.00, or any other sum whatever.

#### VI.

For answer to paragraph ten of said complaint, this defendant says it has no knowledge or information sufficient to form a belief as to the facts therein alleged and therefore denies the same, and particularly denies that plaintiff has been damaged in the sum of \$90.00 as therein alleged.

#### VII.

For answer to paragraph eleven of said complaint, this defendant says it denies the same and each and every allegation therein contained, and particularly denies that plaintiff was injured in the sum of \$50,000.000, or any other sum whatever.

Further answering and as a further, separate and first affirmative defense, this defendant alleges:

T.

That the accident hereinabove admitted to have occurred, was occasioned by reason of the careless and negligent conduct of the plaintiff himself, and nototherwise, in that he heedlessly, recklessly, and carelessly, attempted to board one of defendant's cars while the same was in motion; that it was contrary to the rules and orders of the defendant company for passengers to attempt to board moving cars, and that in violation of the orders of the defendant company, the said plaintiff attempted to get on board said car by jumping upon the steps thereof after the said car had been set in motion, and without the knowledge, consent, or permission of the employes of defendant in charge of said car. That any injuries plaintiff may have received as alleged in his complaint, were caused by his refusal to obey the rules and orders of the defendant company, and were caused solely by his own wilful, careless, and negligent conduct, and not otherwise, and that plaintiff by attempting to board said moving car assumed all risk and danger of being injured while so doing.

WHEREFORE defendant prays that said action be dismissed and that it go hence with its costs and disbursements herein to be taxed.

J. A. SHACKLEFORD. F. D. OAKLEY,

Attorneys for Defendant.

UNITED STATES OF AMERICA, Western District of Washington. }SS.

F. D. Oakley, being first duly sworn on oath deposes and says: that he is one of the attorneys for the defendant company in the foregoing answer named; that the same is a foreign corporation and he makes this verification for and on its behalf, being authorized so to do; that he has read said answer, knows the contents thereof, and that the same is true.

F. D. OAKLEY.

Subscribed and sworn to before me this 14th day of Feb. 1913.

F. D. METZGER.

(Notarial Seal) Notary Public in and for the State of Washington, residing at Tacoma, in said State.

Due service of the within and foregoing——by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 14th day of Feb. 1913.

A. M. ARNTSON.

For Pltff.

"FILED
U.S. DISTRICT COURT
Western District of Washington
FEB 14 1913
FRANK L. CROSBY, Clerk.

E. C. ELLINGTON, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

VS.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

#### Reply

The plaintiff replies to the "Further, Separate and First Affirmative Defense" contained in the defendant's Answer as follows:—

#### I.

He admits that said accident occurred, and that he was injured thereby, all as alleged in his complaint herein; he denies that he has any knowledge or information sufficient to form a belief as to whether said defendant company has or ever had any rule or order, as alleged in said answer, or otherwise or at all; and denies each and every other allegation therein contained.

#### II.

Plaintiff further alleges that if said defendant ever had any such rule or order, as alleged in said answer, the existence and purport of the same have at all times been wholly unknown to the plaintiff, and that he has at no time had any knowledge or notice thereof. And further, that if any such rule or order existed, the same was unnecessary and unreasonable, and not binding upon this plaintiff.

WHEREFORE plaintiff prays judgment as in his complaint herein.

M. G. HENRY.

Plaintiff.

ANTHONY M. ARNTSON. Attorney for Plaintiff.

STATE OF WASHINGTON, SS. County of Pierce.

M. G. HENRY, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing reply, that he knows the contents thereof, and that the same is true.

M. G. HENRY.

Subscribed and sworn to before me this 28th day of February, 1913.

ANTHONY M. ARNTSON.

(Notarial Seal) Notary Public in and for the State of Washington, residing at Tacoma.

Received a copy of the within Reply, service whereof is admitted this 1st day of March, A. D. 1913.

J. A. SHACKLEFORD. F. D. OAKLEY.

Attorneys for Defendant.

"FILED

U. S. DISTRICT COURT

Western District of Washington

MAR 1 1913

FRANK L. CROSBY, Clerk.

E. C. ELLINGTON, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

VS.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

#### Verdict

We, the jury empanelled in the above entitled cause, find for the defendant.

M. C. LOWRY,

Foreman.

(Endorsed):—

"FILED

U. S. DISTRICT COURT

Western District of Washington

NOV 1 1913

FRANK L. CROSBY, Clerk.

By F. M. HARSHBERGER, Deputy Clerk."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

VS.

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

### **Judgment**

This cause came on regularly for trial in the above entitled court in the Federal Building, at Tacoma, Washington, on the 28th, 29th, 30th and 31st days of November, 1913, before the Hon. E. E. Cushman, Judge presiding, and a jury. Anthony M. Arntson Esq. appearing as counsel for the plaintiff and Messrs. John A. Shackleford and F. D. Oakley appearing as counsel for the defendant; the case was tride before the court and jury and after the introduction of evidence on the part of the plaintiff and on the part of the defendant, the cause was submitted to the jury under instructions by the court; after deliberation the jury returned to the court and reported a verdict in favor of the defendant, Tacoma Railway & Power Company, and upon motion of John A. Shackleford and F. D. Oakley, attorneys for the defendant,-

IT IS HEREBY ORDERED, that judgment be and the same is hereby rendered in favor of the

defendant, Tacoma Railway & Power Company, and against the plaintiff, together with its costs and disbursements in this action to be taxed according to law.

DATED Nov. 18, 1913.

(Signed)

EDWARD E. CUSHMAN,

Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Nov. 18, 1913.
FRANK L. CROSBY, Clerk.

F. M. HARSHBERGER, Deputy.

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

VS.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

# Petition for New Trial

Now comes M. G. HENRY, the plaintiff in the above cause and, upon the reporter's transcript of his shorthand notes, the affidavits of Edward J. Scott, M. G. Henry and Anthony Arntson herewith filed, the minutes of the court, the bill of exceptions and all and singular the pleadings, files, documents and proceedings in said cause remaining, makes and

files this, his petition for a new trial, for the following causes materially affecting his substantial rights in said action viz:

I.

Irregularity in the proceedings of the court by which plaintiff was prevented from having a fair trial.

#### II.

Newly discovered evidence material for the plaintiff which he could not with reasonable diligence have discovered and produced at the trial.

#### III.

Errors in law occurring at the trial, which your petitioner specifies as follows, to-wit:

- (a) The Court erred in rejecting the testimony of plaintiff that, in consequence of the injury of which he complains in this action, while walking upon the public streets, he would slide or shoot toward people, who would stick out their elbows and dig him in the side, and that, several times, "Miserable whelps" had actually struck him hard (See Bill of Exceptions, 3 to 5);
- (b) The court erred in refusing to permit the witness OWEN A. ROWE to answer the following question, viz:

"Will you state whether, in your opinion, Mr. Henry was a good bond buyer." (See Bill of Exceptions, 17);

(c) The court erred in excluding the testimony offered to be given by the witness OWEN A. ROWE to the effect that the plaintiff was a thoroughly com-

petent bond man up to the time of the accident, and that he was very successful in the handling of large issues of bonds, running into hundreds of thousands of dollars. (See Bill of Exceptions, 17, 18);

- (d) The court erred in refusing to permit the witness MRS. M. G. HENRY to testify concerning what was said to her by plaintiff in the evening following the accident on his arrival home in Seattle, concerning the causes of his condition at that time. (See Bill of Exceptions, 20.);
- (e) The court erred in refusing to permit the witness H. R. PRATT to answer the following question, viz:

"Is that interest to continue?" (See Bill of Exceptions, 28);

(f) The court erred refusing to permit the witness H. P. PRATT to answer the following question, viz:

"State whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?" (See Bill of Exceptions, 28);

(g) The court erred in rejecting the testimony of the witness H. P. PRATT, offered by plaintiff that, "by reason of plaintiff's condition—his inability to do business and to travel about as demanded by the business" of the firm of which plaintiff and the witness were members, "matters have progressed to a point where they," the other members of the firm, "have had to carry Mr. Henry for some time, more as an act of charity than otherwise, and that the end has come, or will come within a

short time, when he must sever his connection with" the business of the firm. (See Bill of Exceptions, 28 to 29, inclusive);

(h) The court erred in instructing the jury, in connection with the matters referred to in the specification "(g)" aforesaid, as follows:

"There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carried others around for pleasure excursions, himself. Counsel must be careful and not be continually fluttering around the border line of what is objectionable, in trying to get it in one way or another." (See Bill of Exceptions, 29; Transcript of Reporter's Notes, 147);

(i) The court erred in instructing the jury in the course of the trial, in connection with the matters referred to in the specifications "(g)" and "(h)" above set forth, as follows, viz:

"The remarks of the court are in a sense provoked by the counsel. The remarks of the court would not ordinarily be justified, as you are the sole and exclusive judges of the facts in every case from the evidence. Counsel, by this offer, which he had no business to make in the form that he did—the court felt it required some reprimand to call his attention to the fact, so that he would not repeat it; and, therefore, the remark was made." (See Bill of Exceptions, 29-30; Transcript of Reporter's notes, 147);

(j) The court erred in refusing to permit the

witness MARTIN MATHIESON to answer the following question, viz:

"I show you defendant's Exhibit G, being a form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?" (See Bill of Exceptions, 52);

(k) The court erred in refusing to instruct the jury as follows, viz:

"It is admitted by the pleadings in this case that, at the time alleged, one of the defendant's cars stopped to take on passengers, and that an accident occurred; and, if you shall find from the evidence that plaintiff was at the car before it again started, for the purpose of boarding it as a passenger, and that as he was about to get on, the car was started, and, in consequence thereof, he was injured, the defendant is liable, unless you shall believe from the evidence that the agents of the defendant in charge of the car exercised the highest degree of care and diligence to ascertain his danger and avoid the accident consistent with the operation of the car."

(1) The court erred in refusing to instruct the jury as follows, viz:

"The law presumes that, at the time of the accident, plaintiff was exercising all the care for his own safety that would be expected of persons of ordinary prudence in boarding the car under the circumstances disclosed; and, in the absence of evidence sufficient to satisfy you that he was not in

the exercise of such care, the burden rests upon defendant to prove that its whole duty to plaintiff was performed and that the injury was unavoiable by human foresight."

(m) The court erred in refusing to instruct the jury as follows, viz:

"It was the duty of the conductor in charge of this car to allow persons offering themselves as passengers a sufficient time in which to board the car and reach a place of safety upon it; and, if you shall believe from the evidence, that a reasonable time was not allowed to plaintiff to get to a place of safety on the car, and that by reason of the failure of such conductor or other persons engaged in the operation of the car to allow plaintiff such reasonable opportunity to board the car, he was injured, defendant is liable.

(n) The court erred in refusing to instruct the jury as follows, viz:

"Not only was it the duty of defendant's agents to allow plaintiff a reasonable time in which to board the car, if he was present at the time it stopped or before it started for the purpose of getting on, but it was their duty to see to it that the car was not started again while the plaintiff was in the act of getting on or off in a place where he would be exposed to danger in case the car were to be moved. In other words, stopping the car a reasonable time to allow plaintiff to get on to it would not of itself be sufficient, but it was the duty of the conductor to see and know that the plaintiff was not

either in the act of boarding the car or in a dangerous position in case the car should move before starting the car; and, if he failed in that duty, and plaintiff was injured, defendant is liable."

(o) The court erred in refusing to instruct the jury as follows, viz:

"The defendant is held to the highest degree of care, skill, and diligence for the safety of persons about to board its cars consistent with the conduct of its business. This car was under the control of the agents of defendant and they were bound to know, if by the exercise of extraordinary care, caution, and diligence they could know whether plaintiff was attempting to board its car at the time of the accident, before permitting the car to start in such manner as would be liable or likely to injure him, and if, in consequence of even slight neglect in the performance of such duty, plaintiff was hurt, defendant is liable."

(p) The court erred in refusing to instruct the jury as follows, viz:

"Sound public policy requires that street car companies be held to the strictest diligence and care to prevent injury to persons while getting upon their car as passengers; and if you shall believe from the evidence that, before starting this car, the conductor did not do all in his power, consistent with performance of his other duties upon it, by looking, listening, inquiring, or otherwise, to ascertain whether plaintiff was present and in the act of getting on, or was where he would be liable or likely

to be hurt, and to avoid injuring him, and that, in consequence of the failure of the conductor to discharge his full duty in that respect, plaintiff received the injuries complained of by him, defendant is liable."

(q) The court erred in refusing to instruct the jury as follows, viz:

"In boarding the car, plaintiff was bound to use only such care as a ordinarily prudent man might be expected to use under like circumstances in view of the probable danger in doing so; and, in determining whether, in this instance, he did experience such care, you should take into account the circumstance that the conductor owed to the plaintiff the highest practicable degree of care to avoid injuring him, and that plaintiff was entitled to expect the conductor to perform such duty."

(r) The court erred in refusing to instruct the jury as follows, viz:

"If you shall believe from the evidence that, in taking hold of this car and holding to it, if he did not take hold of it and hold on as he has testified, the plaintiff did not exercise all the care to be expected of an ordinarily and cautious and prudent person to exercise, but, nevertheless, shall believe that the injury to him, if any, was due to a sudden movement of the car, unexpected by him, brought about by the failure of those in charge of the car to ascertain his position and danger before putting the car in motion, and that, by the exercise of extraordinary care and diligence on the part of such

persons, consistent with the operation of the car, the accident could have been avoided, the defendant is liable."

(s) The court erred in refusing to instruct the jury as follows, viz:

"If you shall find from the evidence that the injury complained of was inflicted and was due to the failure of the conductor or other persons in charge of the car to exercise the highest diligence and care to avoid it practicable to be exercised, the defendant is liable unless you shall further find from the evidence that plaintiff failed to use the care for his own safety generally exercised by persons of ordinary caution and prudence under like circumstances in getting or attempting to get upon such a car; and, even then, if you believe from the evidence that such failure to exercise care on the part of plaintiff was merely the remote, and the want of care and diligence on the part of the agents of defendant was the direct and immediate cause of the accident, defendant is liable."

(t) The court erred in refusing to instruct the jury as follows, viz:

"In this class of cases, the fact that plaintiff was injured without apparent fault on his part, is sufficient to establish negligence of defendant, and to cast upon it the burden of proving, that the injury could not have been avoided by human foresight; and, if you believe from the evidence, that plaintiff, when attempting to board this car, did what men of ordinary prudence usually do under like circum-

stances, and was, nevertheless, injured, unless you are further satisfied from the evidence that the agents of defendant in charge of the car did everything in their power consistent with their other duties that human foresight could suggest to ascertain the presence and situation of plaintiff, and to avoid injuring him, your verdict must be for plaintiff."

(u) The court erred in refusing to instruct the jury as follows, viz:

"If you shall believe from the evidence that, by reason some disease or condition, inherited by plaintiff or otherwise acquired, he was at the time of the accident already predisposed to nervous affections or diseases such as he exhibits at this time, if he exhibits any, such fact will not of itself excuse the defendant, or render it less liable in this action. The cars of the defendant are not operated for the sole use of healthy persons, but for the use of all persons without regard to their physical or hereditary weaknesses; and the defendant is chargeable with notice that persons of different bodily conditions and predispositions to disease will board their cars. It is reasonable to be expected that, in certain cases, if an injury happen to a person already predisposed to affections of diseases of nervous system, such injury may cause such affections or diseases to develop, or, if at the time of the injury such affections or disease have already developed, that the cure of them may be retarded or prevented entirely by the hurt."

(v) The court erred in refusing to instruct the jury as follows, viz:

"If you shall find for plaintiff, and that his present condition is the natural result of his injuries, he is entitled to recover such sum as, in your judgment, under all the circumstances disclosed by the evidence, will fairly compensate him."

(w) The court erred in refusing to instruct the jury as follows, viz:

"In case you shall find for plaintiff, he is entitled to be made good, so far as money can do it, for any damages he may have suffered, and, in considering the sum to be awarded him, you should take into account every circumstance proven to your satisfaction by the evidence, tending to show a damage to him which you believe to be the natural and proximate result of the injuries suffered by him, including—

- —a—Any pain he may have suffered or will probably be suffered by him in future resulting from the injury;
- —b—Any mental distress he may have suffered or is likely to suffer in future resulting from the injury, such as a sense of humiliation or mortification caused by the acts or conduct of persons whom he has met or may meet induced by his appearance and condition arising from his injury;
- —c—Any anxiety or danger he has been or may be subjected to because of the conduct of dogs induced by his appearance or acts arising from his injury;

- —d—Any loss of earning capacity he may have suffered or is likely to suffer in future because of the injury suffered by him;
- —e—Any loss of enjoyment of life he may have suffered or is likely to suffer in future in consequence of his injuries;
- —f—Any expense he may have reasonably incurred in efforts to cure or obtain relief from his injuries to the present time;
- —g—Any other circumstance which has been proven to your satisfaction by the evidence which, in your judgment, adds to the damages suffered by him in consequence of his injuries.

Wherefore Petitioner asks for a new trial herein.

M. G. HENRY,
Plaintiff and Petitioner.

ANTHONY M. ARNTSON and T. W. HAMMOND Attorneys for Plaintiff.

STATE OF WASHINGTON SS. County of Pierce.

M. G. Henry being first duly sworn, on oath deposes and says: That he is the plaintiff and petitioner in the above entitled action; that he has read the foregoing petition for new trial and knows the contents thereof and that he believes the same to be true.

M. G. HENRY.

Subscribed and sworn to before me this 29th day of December, 1913.

ANTHONY M. ARNTSON.

(Seal)

Notary Public in and for the State of Washington, residing at Tacoma.

"FILED IN THE
U. S. DISTRICT COURT
Western District of Washington
DEC 29 1913
FRANK L. CROSBY, Clerk.
By F. M. HARSHBERGER, Deputy."

## Stipulation

It is hereby stipulated and agreed by and between the parties to the above cause that the hearing of the petition of plaintiff for a new trial therein may be continued until Monday, January 19, 1914.

Dated January 6, 1914.

J. A. SHACKLEFORD.
F. D. OAKLEY.
Attorney for Defendant.
A. M. ARNTSON and
T. W. HAMMOND,
Attorneys for Plaintiff.

(Endorsed):-

"FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington
Southern Division
JAN 6 1914
FRANK L. CROSBY, Clerk.
By F. M. HARSHBERGER, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

M. G. HENRY,

Plaintiff,

vs.

TACOMA RAILWAY & POWER

No. 1262 COMPANY, (a corporation),

Defendant.

### Order

This cause came on regularly to be heard on Monday, the 19th day of January, 1914, upon plaintiff's motion for a new trial heretofore filed herein, plaintiff being represented by his attorneys, Messrs. Arntson & Hammond, and the defendant being represented by J. A. Shackleford and F. D. Oakley, its attorneys, and the cause having been fully argued, and the court being fully advised in the premises,

IT IS THEREFORE ORDERED, that plaintiff's motion for a new trial herein be and the same hereby is denied and overruled.

Done in open court this 21st day of January, 1914.

EDWARD E. CUSHMAN.

Judge.

"FILED IN THE U. S. DISTRICT COURT

Western District of Washington,

Southern Division.

JAN 21 1914

FRANK L. CROSBY, Clerk.

By F. M. HARSHBERGER, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

VS.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

## Bill of Exceptions

BE IT REMEMBERED that, on October 28, 1913, at a term of said court held at Tacoma, in said district, before Hon. E. E. CUSHMAN, District Judge, the issues joined by the pleadings in the above cause came on to be tried before said judge and a jury, the plaintiff being represented by his attorneys, Anthony M. Arntson, Esq., and T. W. Hammond, Esq., and the defendant by F. D. Oakley, Esq., whereupon the following proceedings were had, to-wit:

M. G. HENRY, the plaintiff, called in his own behalf, testified, among other things, as follows:

He had resided in Tacoma since September 14, 1911. Prior to that, since 1901, he had resided at Seattle. On April 6, 1911, he was in Tacoma buying bonds for his employers, Carstens & Earles of Seattle, and had occasion to take a street car, and waited on Pacific Avenue near the Rhein Hotel for one he saw approaching. He was accompanied part way toward the car by a young man with whom he had been talking at the office of an acquaintance. The car came and stopped to let on a number of passengers who were waiting for it. The entrance to the car was "amidships." He stepped to the rear of the entrance and stepped aside to permit a couple of ladies to precede him. As the last of them stepped up, he grasped the handhold of the car with his left hand, put one foot upon the step, reached with his right hand for the other handhold and had secured a light hold, when, without warning, the car started. He was jerked off his feet, felt himself going, thought he was going under the rear tracks of the car, and that was the last he knows of what happened. He had a very faint recollection of going back to the Donnelly Hotel, where he stopped when at Tacoma, and of feeling used up. There, with assistance, he went to the toilet, and vomitted blood. He was sent from there to a steamer and went home. He felt very sick and dazed, and remembers vomitting more blood on the boat. the following day, he consulted Dr. Gardiner, of Seattle.

The result of the accident was a rupture of his stomach and an injury to his head. He continued his work with Carstens & Earles with difficulty. He had been engaged in various occupations until he was employed by Carstens & Earles, who were engaged in the investment banking business. fore the accident, he had studied along financial lines, was rapidly building himself up and had thoroughly mastered the business in which his employers were engaged. His work with them was, primarily, the purchase of bonds, a business requiring judgment and a knowledge of securities. Prior to the accident, for several years, his health had been perfect, his recreations being canoeing, boating, hunting, fishing, and other out of door pleasures. At the time of the accident, he was drawing a salary of \$100 per month. After the accident, he was a physical wreck. He tried to do his work, and hung on until about the middle of August, 1911, when he was discharged. At that time, he had a launch on a lake, and, once, because of his inability to use his legs, fell from it into the lake. He had a motor cycle, but was obliged to give up using it. It was a matter of frequent occurrence, while walking along the streets in Tacoma, and elsewhere, for people to insist on helping him. For a long time he had been in such condition, that he avoided crowds. He bumped into people. Once, at Raymond, he was walking on a sidewalk ten feet wide, and, through his legs not working together, nearly went into the mud and

ooze where the tide ran in and out. At another time, while at Raymond, from the same cause, he fell and was helped up. He tries to walk straight, but frequently bumps into people. He dreaded to walk on the streets. Women and children were afraid of him, and got out of his way, even into the street, daily. At other times, he would slide or shoot over toward people, who did not know his condition, and they would hit him, stick out their elbows and give him a dig in the side, or whatever part of his body they happened to touch. "Several times, miserable whelps have actually struck me—hit me hard—(interrupted).

MR. OAKLEY: I think this has gone a sufficient or too great a length.

MR. ARNSTON: It seems to me it is material matter—that this jury should know this man cannot control—(interrupted).

THE COURT: Objection sustained. It cannot be said that anyone striking a person who showed evidence of affliction was the proximate result of the injury. Any one who would do the like of that would be mean enough to strike a woman or strike anybody.

MR. HAMMOND: We desire an exception.

THE COURT: Exception allowed.

MR. ARNTSON: These matters, it appears to me, would have a bearing upon the nature of the damages, as showing the mental suffering which the man has had to experience by reason of the humiliation resulting from his condition.

THE COURT: You are showing here the cause of the fault that he charged the street car company with. If you are right, the street car company is not necessarily the only institution in the world at fault; and, if somebody else has been guilty of a fault, like striking a man for some reason, that is not anything that the street car company is answerable for.

MR. HAMMOND: Of course, plaintiff would not be entitled to recover damages because of an injury received from a stroke. But, assuming that the company is liable, it must have known what would be the natural consequences of such an injury as he suffered. It would know that this man, in endeavoring to get around the streets, would necessarily become an object of aversion, perhaps, or anger, or something of that kind. It would be the natural consequence of the condition which followed the injury. If it be true that he has been interfered with in this way, and humiliated upon the streets, or even struck, it seems to me it would be proper matter to go before the jury to show the actual injury he has suffered because of the original injury. It is proper, it seems to me, for us to place before the jury and before the court all the circumstances which have resulted from the injury, and which might add to his mental distress, or even pain, upon the question of what would be proper compensation for the injury. At any rate, it is a question which should be submitted to the jury, to determine whether or not it was what anyone would

naturally expect from such an injury. If I go travelling around the street and bumpt myself against people because of an injury which has been inflicted upon me by the negligence of some other person, it is a circumstance which would naturally tend to embarrass me and add to my mental distress—and mental distress is an element of damage proper to be shown.

THE COURT: Objection sustained. I think it is too problematical, if the man has been struck, whether that is the cause.

MR. HAMMOND: We desire an exception.

THE COURT: Exception allowed.

MR. ARNTSON: As I understand the court's ruling, it would be proper for Mr. Henry to proceed with other matters showing the conditions and humiliations which he has suffered.

THE COURT: Yes, if it is directly traceable to the injury.

THE WITNESS then continued:

In walking up or down hills, I have the utmost difficulty. Once, on 11th Street, through the refusal of my legs to work together, I was helpless and fell. At different times, in stepping off the curb, from the same cause, I have fallen. On two occasions, through my inability to control my gait, I have shot sideways toward a dog, and he bit me. I frequently have trouble with dogs. They frequently run away, but sometimes snap at me. I have difficulty in physical work. I sometimes use all my will power to do the trivial things. Owing to the difficulty of

handling myself on the street cars. I have an automobile. All the time, I have more or less difficulty in handling it. There are times when I want to turn out, and my muscles will not respond. Once on a wide road where three machines could easily have passed, through my inability to control my muscles, I got off on the side of a hill. I have difficulties all the time. I will think I want to stop in one place and will stop to the contrary. There are times when I want to go forward, but will go backward. I will raise my foot to put it on a curb or step, and either do not raise it high enough or raise it away too much. I have trouble putting on my coat. I will reach for something, and either cannot grasp or cannot hold it. I drop things. If I go into a crowd, I am helpless. My sense of balance is affected. It is not dizziness; but an inability to control my muscles. It is impossible for me to run. The moment I try to hurry, I am helpless. I am absolutely unable to do my physical work. I use an automobile with difficulty because I have to. I have trouble starting it, and am constantly helped. Frequently, I cannot start it at all. It is necessary, in connection with my business, for me to go to outside towns occasionally. In Elma, last year, boys tried to stop me and made sport of me. They thought I was drunk. At another time, in Anacortes, the night marshal saw me and thought I was drunk. He took me by the arm and took me to the hotel, and would not leave me until assured I was a guest there. In Tacoma, the police officers

at different times thought I was drunk, and stopped me. I felt humiliated, and was obliged to request the police department to let me alone. In Chehalis one evening, the proprietor of a picture show refused me admission. I was walking with great difficulty and ran against him and he would not permit me to go in. I had a slight uncertainty in my walk, in fact, a marked uncertainty, directly following the accident. For a long time I had a falling sensation, as if falling backwards. I had a great deal of difficulty in walking, and gradually it grew worse until I reached my present condition. I never had any such trouble before the accident. Something happened to my stomach, my head and spine. I was injured in my legs, my arms and back. My hearing was affected. I have difficulty in placing sound. When I lie down, I have the most horrible feeling, as if I were falling. The accident has resulted in a nervous condition manifested in various ways. Many nights I lie awake all night suffering -not pain. I cannot describe it. It has resulted in great difficulty to do business. While I try hard to work, the amount is nominal. I am in the investment banking business—Henry-Pratt & Co. Our office is in Tacoma. Following the rupture of my stomach, I suffered excruitating pain for weeks. Finally that disappeared, and I have suffered no pain since. I have spent approximately \$1200 for medical treatment by reason of the injury.

Cross-examined by MR. OAKLEY, he testified: I came to Washington in the fall of 1901. I was

employed first by the Seattle Hardware Company for a year. I then worked a year for the Merchants Association. Then I went for several months to juneau, reorganizing the Jorgenson Co.—hardware, lumber and fishing supplies. I went back to Seattle that summer and went to buying and selling real estate until fall. I then became interested in the Hogdahl Company, house furnishing. It failed and I went to work for Carstens & Earles in Seattle, investment bankers, dealing in bonds and mortgages —buying and selling bonds and mortgages. The bulk of the business was buying and selling special or district municipal bonds. It was my third year with them, I believe, when the accident occurred. I guit working for them in the middle of August, 1911. After that, for awhile, under advice of my physician, I did nothing but stay out doors. Mr. Pratt and I opened the company of Henry-Pratt & Company, in this city in September. He was in the bond business before I was associated with him. It was agoing concern—H. P. Pratt & Co. Prior to that time, I had had a great deal of experience in buying bonds in Tacoma, and was familiar with the situation. The business of our firm is primarily investment banking, bonds and mortgages. The accident occurred on or about April 6, 1911. man upon whom I called just before the accident was Frederick K. Beebe, a dealer in coffee. I have talked with him once or twice since. When I went into his office, I talked with a stenographer or accountant—quite a young gentleman. I believe his

name is Fred Hall. I believe the Rhein Hotel is on the corner. Mr. Beebe's place might be possibly fifty feet from it. When the time came for me to go, the young gentleman and I were talking. He came out with me. There was no car in sight. When it hove in sight, I walked down where it would stop with the other passengers. My recollection is, he walked out on the sidewalk with me. The car was then perhaps half a block away—on the south side, coming down the hill. I saw it some distance up and walked out and was waiting for it when it came. It was one of the side entrance cars. When the car stopped to take on passengers, I walked back possibly five feet. Mr. Hall walked a few feet with me, and I left him and went out to the car. There were a number of people, and my recollection is there were two ladies; there were also some men. I stepped back a little for the ladies, as one would do, and as they went up the steps I follows. As they went up the steps, I was preparing to follow them. I had nothing in my hands. The car stood there. (indicating). This would be the rear handle of the car (indicating). I put my hand on that and reached with this hand (indicating) to grasp this one handle; put my foot on the step, and I was just in a position, swinging -putting my weight on-just starting to swing myself, when the car started. I had an ordinary hold. I grasped the handle with my left hand first, and then with my foot and right hand—I reached like that (indicating), and had my right hand on

the handle, and just started to pull myself up, and the car started. I did not do anything when the car started. I felt myself going, and that is all. I cannot tell you, except the impression that flitted through my mind. I felt myself being jerked. I swung back. I had hold with my left hand-I had hold with both hands, but a firmer grasp with the left. Unconsciously, I held on, and was dragged. My right hand let go. The weight was on my foot and then it fell off the step. This was the car (indicating), and here is the handhold. I hung on with my left hand and swung around on back like this (illustrating), clear around. My legs dragged on the ground. Whatever happened I tore my coat and the left knee of my trousers. I could not say how far I was dragged. I was dazed-I do not know what happened then. I could not tell you how I got on the car. I remember having signed the complaint. It is dated November 26, 1912.

MR. OAKLEY: I want to read this to you and see whether the facts stated here are as you recollect them at this time—just at this point here in the third paragraph—"That as the plaintiff was so entering said car, climbing upward on the steps thereof, with one hand grasping a hand-hold thereon?"

A. Yes, sir.

MR. OAKLEY: "said car was, by and through the carelessness, negligence and incompetency of the defendant's servants and employes, knowingly and negligently intrusted by said defendants with the operation thereof, started forward with a sudden jerk, without any warning to the plaintiff, whose position as above described was then known to the defendant's said servants and employes, or would have been known to them had they exercised due care in the operation of said car". Before we go any further than that, which is correct, this complaint or the testimony you have given?

MR. ARNTSON: I object on the ground that it is irrelevant and immaterial. If any slight variation should occur between the complaint and the testimony, it would probably be subject to amendment; but so far as putting the witness to the test as to the exact wording of the complaint, which was drafted by his attorney, and his testimony on the stand, it seems to me would be unfair.

THE COURT: Objection over-ruled, and exception allowed. "Q. I will call your attention to the next part of this, that the starting forward of said car as aforesaid was wholly unexpected by the plaintiff and caused him to lose his balance and footing and swung him around and off his feet. "A. Yes, swung him down from the steps as it necessarily would.

MR. OAKLEY (Reading), "And struck his head and body violently against the side of the car with such force as temporarily to deprive him of his control of his faculties. \* \* \* that in the instant, before the plaintiff was able to realize his predicament or to release his hold of said hand-hold, or to take any action for his own protection, his

body was by the continued forward motion of said car, swung inward toward the rear trucks of said car, close to the track rail." Is that right?

- A. Undoubtedly.
- Q. (Reading) "And that in order to avoid great injury it became necessary for the plaintiff to retain his hold on said hand-hold and to drag himself back upon the steps of the car", is that right?
- Q. (Reading) "And that such course appeared to the plaintiff to be necessary to avoid the impending danger \* \* \* \*"

WITNESS: Both are correct. I had a firm hold with the left hand. My weight was on my left foot, and I had hold with the right hand, but not firmly. I remember pulling myself up. My recollection is not different from what it was when I signed the complaint. The starting of the car swung me down from the steps and dazed me. Before I was able to realize my predicament, or to release my handhold, or take any action for my protection, undoubtedly, my body was by the continued motion of the car swung inward toward the rear trucks of the car; and, in order to avoid great injury it became necessary for me to retain my hold and drag myself back upon the steps of the car. The dragging of myself back was all an unconscious action on my part. Undoubtedly, after having been dragged some distance, dazed and unconscious, I pulled myself back upon the car. I have done greater feats of strength than that. felt myself being jerked and thought I was going

under the rear trucks. I was not deprived of my faculties as I was being jerked; but, after I was jerked, I do not know.

MR. OAKLEY: How do you reconcile this I just read to you, where you state that the car started forward wholly unexpected to you, and you lost your balance and footing, and "swung around off his feet, and struck his head and body violently against the side of the car, with such force as to temporarily deprive him of the control of his faculties?"

MR. ARNTSON: I object on the same ground as before—irrelevant and immaterial.

THE COURT: Objection over-ruled. Exception allowed.

WITNESS: The car started and swung me around, and my head struck some part of the car. I cannot say what place or how.

Q. Now you have a pretty distinct recollection of everything that happened for one who was deprived of his faculties. I want to read this further.

MR. OAKLEY: Here is paragraph five of the complaint: "That the plaintiff, in a dazed condition resulting from said blow and the shock of said accident, and in the face of the imminent danger, aforesaid, retained his hold upon said hand-hold, and attempted to regain his footing on the steps of said car, in an effort to save himself from further injury; and, after struggling for several seconds, did succeed in regaining said steps and, climbing them, entered said car?" Is that how it happened?

WITNESS: Yes, sir.

MR. ARNTSON: It is understood, I am objecting to all of this testimony.

THE COURT: Yes,—over-ruled and exception allowed.

MR. OAKLEY: The sixth paragraph: "That from the time said car so started forward until the plaintiff regained said steps, as aforesaid, said car, by the carelessness and negligence of the defendant's said servants and employees, continued its forward movement, with ever increasing speed, dragging the plaintiff along the rough pavement and making it impossible for him to gain a footing upon the pavement; that during all of said period the plaintiff's situation as above described, was well known, or by the exercise of reasonable care, caution or diligence would have been known, to the said servants and employees of the defendant, and that by the exercise of reasonable diligence and care the said servants and employees of the defendant could, during said period, have stopped said car, and thus have enabled the plaintiff to release his hold and drop to the pavement without danger of being run over by said wheels or trucks." The conductor was standing—that is about the way this happened in your mind—the way you were dragged along there?

WITNESS: As it happened in my mind? As it did happen. I could not say whether the conductor or anyone else stopped the car. I cannot say what happened after my body struck the car.

MR. OAKLEY: Why did you undertake to come

into court and swear to a proposition of this kind? What explanation have you to make?

WITNESS: That is established on the evidence that we have. It is based on the evidence that we will produce.

I have talked to the conductor who was on the car, and he stated that he did not see me. He was two-thirds of the way back in the car—Mr. Mathieson. There were two conductors on the car. I do not know what I said to Mr. Mathieson. When I went back to the hotel, I vomitted blood. I had a hemorrhage from the ear while in the car. I had hemorrhages from the stomach from gastric ulcers, in 1907, but recovered from them fully. Never had a hemmorhage from the lungs, nor tuberculosis. There has never been any tuberculosis in my family so far as I know. I had purchased the automobile in January, 1912. That was a four passenger car. The one I have now is a little larger. I bought it early in 1913. I have driven it up the mountain from Tacoma several times. Drove it as far as the glacier this summer. That is not one of the most dangerous roads in the state by any means. persons drive carefully, there is no danger. I have been up that road possibly eight or nine times. took a couple of clients up there last month—went up Saturday and came back Sunday. (At this point a letter, signed by plaintiff and addressed to defendant, was offered and received in evidence, marked "Defendant's Exhibit B."):

MR. OAKLEY: This letter, Mr. Henry, is

written upon the letter head of Carstens & Earles, Investment Banker, Seattle, (reading): "Superintendent Bean, Tacoma Railway & Power Co., Tacoma, Wn. Dear Sir: Permit me to utter a vigorous protest against the carelessness of your employees in the matter of starting a car before a passenger is fully aboard. Last Thursday, the 6th inst., the writer was entering car 115 which was in charge of conductor 259"—Where did you get those numbers?

WITNESS: Somebody wrote a note and put it in my pocket, which I afterwards discovered when I got home. That note has disappeared. I am not certain as to whether it was signed. Shortly after I wrote this letter, it was taken away. I put the memorandum in my desk, and, when later I wanted it, it was gone. It had on it those items (indicating), and, whoever placed it there, had taken the trouble to get several names. He wrote those names there.

MR. OAKLEY (Reading), "Last Thursday, the 6th inst., the writer was entering car No. 115, which was in charge of conductor No. 259, and with one hand grasped the rail or door in the act of entering, when without warning the car started, as a result I was nearly thrown under the car and was much bruised and suffered severely a strain in the arm and back, besides the shock which unnerved me. I voiced my protest to the conductor in the presence of witnesses . . ."

- Q. You do not explain that,—if you did not know what was done there.
- A. Whoever gave me the note noticed I was in a dazed condition, and wrote a brief statement of the matter and I took my information from that. I have no distinct recollection of what I did.
- Q. Well, how do you know that you voiced your protest to the conductor in the presence of witnesses? You have not explained that yet.
- A. That statement there had the names of different people written on it . . . Yes, this note that I am mentioning had a statement and had the names of the people. . . I sent Mr. Arntson a copy of the letter. I that I was going to die and I wanted him to have it in case I did die.

ANDREW HARRIS, a witness called on behalf of plaintiff, testified, among other things, as follows:

Direct examination by Mr. Arntson:

He had known plaintiff a number of years. Was clerk at the Donnelly Hotel at the time of the accident. About noon time, on April 6, 1911, plaintiff came into the hotel in a very dazed condition. There was blood all over him and his clothes were "mussed up." He asked plaintiff if he could assist him; and took him into the toilet and left him there vomitting blood. Later he put plaintiff on the bus to go to the Seattle steamer. Had seen plaintiff twice since. Plaintiff was a wreck from his former self. When he came to the hotel blood was oozing from one of his ears.

M. D. PEARSALL, a witness called on behalf of plaintiff, testified—

On direct examination by Mr. Arntson:

Had known plaintiff since the fall of 1909, and had seen him nearly every day from that time to the time of the accident. Prior to the accident plaintiff's condition and health were good. He should judge it was some weeks after the accident before he saw him. Then, he was walking with a cane and not very well. Noticed that his legs were not good, and he looked bad. He saw plaintiff frequently after that until he came to Tacoma to live, in the fall of 1911; and noticed that he grew worse all the time. Had seen him several times since he left Seattle, and plaintiff seemed to be growing worse all the while in his walk and movements.

On cross-examination by MR. OAKLEY:

Plaintiff was a customer of his at his store; and they used to go out together in plaintiff's launch nearly every Sunday.

WILL KOPTA, a witness called on behalf of plaintiff, testified—

On direct examination by Mr. Arntson:

Had known plaintiff about four years. Lived next door to him in Seattle and saw him nearly every day. Prior to the accident, plaintiff was working around his house and seemed in good shape. Some weeks after the accident, he saw plaintiff, who then looked like a sick man. Plaintiff looked pale and did not walk well. After that, while plaintiff remained at Seattle, he noticed that

plaintiff was getting feeble, would walk slow, and "seemed to need all the sidewalk."

On cross-examination by MR. OAKLEY:

He did not know how long plaintiff was confined to his house after the accident. He did not see him for several weeks, and then noticed his walk. Plaintiff then walked "kind of tottery," not nearly as bad as he does now.

OWEN A. ROWE, a witness called on behalf of plaintiff, testified as follows:

On direct examination by MR. ARNTSON:

He is in the business of real estate and mortgage loans. Had known plaintiff six or seven yearsthe last four, intimately. Knew plaintiff while he worked for Carstens & Earles. Was at that time in charge of the mortgage department of that firm. At that time, plaintiff was the bond buyer for the same firm-going to different towns, meeting contractors and bargaining for improvement bonds, and so on. He was acquainted with the ability of plaintiff in that line of business. At that time, plaintiff's health appeared good. Sometime in April, 1911, a great change came over plaintiff. Up to that time, he had been very active contracting for bonds in Seattle and other cities; then he seemed to run down all at once. He did not seem to be the same man at all. Up to that time, plaintiff seemed to be "well on the job," all the time, from early morning to late at night; but, after this change, he used often to go home during the day sometimes during the middle of the day. He was

not in the office half as much of the time as he had been before. Plaintiff had formerly been very active in walking; after the change he seemed unable to control his legs, and kept getting worse in that respect. Plaintiff remained with Carstens & Earles until August or early September, possibly. He understood that plaintiff left the firm of his own accord. He had more or less experience with bond buyers; and thought he knew the qualities which go to make up a good bond man.

MR. ARNTSON: Will you state whether, in your opinion, prior to this accident, Mr. Henry was a good bond buyer?

MR. OAKLEY: I object to that as calling for an opinion which is a conclusion.

MR. ARNTSON: The witness has qualified as an expert and that he is qualified to give an opinion as to Mr. Henry's ability in this regard.

THE COURT: Objection sustained. There may be instances when such evidence is competent, but it occurs to the court that there are three or four ways to arrive at this—the wages he drew, and the length of his experience, and other ways of establishing this matter, without undertaking to make it the subject of expert opinion evidence. Exception allowed.

WITNESS: Continuing:

The plaintiff's experience in the buying and selling of bonds while with Carstens & Earles was very extensive.

Q. State, if you know, what success he made in dealings with bonds?

MR. OAKLEY: I object to that on the ground that it is incompetent, irrelevant and immaterial.

THE COURT: Objection sustained. Any answer he would give would be too indefinite. Exception allowed.

MR. ARNTSON: We offer to prove by this witness that Mr. Henry was a thoroughly competent bond man up to the time of the accident, and that he was very successful in the handling of large issues of bonds, running into hundreds of thousands of dollars.

MR. OAKLEY: The complaint said that he was earning \$100 a month in that business. There is no claim that he has lost a dollar by reason of being unable to perform that business. In fact, he is making more money today, or they would have shown it.

Mr. Arntson called the Court's attentions to the allegations of the complaint.

THE COURT: Objection sustained. You ask a man if he was a very successful bond buyer. That might mean one thing to one man and something entirely different to another. It is too uncertain, indefinite, general, and misleading. Exception allowed.

M. G. HENRY, the plaintiff being recalled for redirect examination, testified as follows:

Examined by MR. ARNTSON:

None of his immediate family had suffered or

died from tuberculosis. He was discharged from his employment by Carstens & Earles, went home and had to lay off. He had "gone the limit." He had a boat and spent practically all his time for a month on a lake, under the advice of his physician. When he signed his complaint, he believed it to be true.

Q. I will ask you whether or not it is true that part of the matter necessarily put into that paper was obtained from others than yourself?

A. Yes, sir.

MR. OAKLEY: I object to the question. It is leading and argumentative.

THE COURT: Objection sustained. He has already explained on cross-examination that a part of it was so obtained. Your question adds nothing to it and it is leading. Exception allowed.

MRS. M. G. HENRY, wife of plaintiff, was called as a witness on his behalf, testified, among other things:

Examined by MR. ARNTSON:

Had been married about 14 years. At Seattle, plaintiff was with the Seattle Hardware Company, the Merchants Association, and worked for Carstens & Earles; and was with the latter firm at the time of the accident. His health was excellent until the accident. He recovered fully from the gastric ulcers he had in 1907. On the day of the accident, when plaintiff reached home, she saw there was something wrong. He did not act as usual. Plaintiff did not eat his dinner and went to the bathroom

where she followed him, and found him working at his ear with his handkerchief. He was wiping off his ear. One of his arms appeared to have been hurt.

Q. What, if anything, did he say to you was the cause of his condition?

MR. OAKLEY: I object to the question as calling for a conversation, hearsay evidence.

MR. ARNTSON: I submit, under the circumstances, this is near enough to the time of the accident to constitute part of the res gestal.

THE COURT: Objection sustained. Exception allowed. This was in Seattle, was it not?

MR. ARNTSON: It was in Seattle on the same day, the man being in a dazed condition.

WITNESS, continuing—

He acted dazed, and she knew he was sick. He vomitted blood. From that time on, he could not retain his food, and she insisted that he go to a doctor. He went, she thought, the next day. After that he grew worse, at times vomitting blood; and he began to walk unsteadily. Plaintiff tried to go on with his work, but grew worse, and could only work part of the day. She noticed his difficulty about walking shortly after the accident. She first noticed a staggering and difficulty in placing his feet. He grew nervous, had trouble picking things up, and dropped things. The stomach trouble continued during that summer. His movements have grown gradually worse until he has reached his present condition. They moved to Tacoma in Jan-

uary, 1912. She has walked with him on the streets in Tacoma. She was in fear that he would fall and be hurt. She had many times heard people on the street say he was drunk, and laugh at him. He had been humiliated by persons making fun of his tottering gait, and saying he was drunk. Ladies noticed his gait, some expressing sympathy, and others derision. She had ridden with plaintiff in his automobile. He was a slow and careful driver, but she did not feel safe in the machine with him. Once while they were driving, the machine turned over. It did the same thing on one other occasion. At times, it had been impossible for plaintiff to sleep. She thought he had not had a thoroughly restful night since the accident. He could not move about the house without a cane. She noticed no difference in his movements about the house in the day or night time. He can move about in the dark as well as in the day. Prior to the accident, plaintiff's recreations were hunting, boating and fishing. Since the accident he has been unable to indulge in those things.

Cross-examined by MR. OAKLEY:

At the time the auto turned over on its side, they were going slow and were not "spilled" out. There were other people in the car, and they climbed out and waited until some other people pulled the car up again. That was the experience both times. That was last spring. They had passed people while driving on the mountain road. She did not remember whether plaintiff went to work the day following

the accident. He was not confined to the house every day. His condition gradually grew worse. She thought he worked during the first week.

Re-direct examination by MR. ARNTSON:

The next day after the accident, she noticed that plaintiff's coat and trousers were torn.

PHILIP S. MURRAY, a witness called for plaintiff, testified, among other things:

Examined by Mr. ARNTSON:

Had known plaintiff about three months, went with him to Raymond on a business trip. Plaintiff had trouble getting around. Once, at South Bend, he was obliged to grab plaintiff to keep him from "skidding" off the sidewalk. Plaintiff seemed to be able to handle the automobile all right. Once in a while he would make a little jump off the road.

Cross-examined by MR. OAKLEY:

That was about the middle of September, 1913.

JAMES PAINE, a witness called for plaintiff, testified, among other things:

Examined by MR. ARNTSON:

Is a contractor for improvement, street grading, water mains, etc. Had known plaintiff about 7 years, and done business with him, selling bonds, ever since he was working for Carstens & Earles. From the time he knew plaintiff, he seemed in good condition. Then, for sometime he did not see him. Finally, one day he saw plaintiff, and hardly recognized him. He seemed nervous, and dragged his feet—that was a month or two after the accident. Had seen him nearly every day since. Once he

saw plaintiff on the street, and people were laughing at him. He thought plaintiff growing worse.

Cross-examined by MR. OAKLEY:

Plaintiff has none of the bonds of the witness now. He had dealt with plaintiff a great deal.

C. E. KEAGY, a witness called for plaintiff, testified, among other things,

Examined by MR. ARNTSON:

Had known plaintiff about two years. Ever since he had known him, plaintiff staggered and was not able to get around very well. Last summer, he made a trip with plaintiff in his auto to Longmire Springs. On that trip, he was asked in plaintiff's presence if plaintiff was drunk.

Cross-examined by MR. OAKLEY:

He took the trip to the mountain on June 27, 1913. His wife, plaintiff's wife, and their children were along. They left Tacoma at noon and got to the inn at 6:20, about 65 miles. They went around the mountain road. It was not a dangerous road. Had been up there six times this summer, always as a passenger in a private car. He did not consider the road dangerous; but any road is dangerous with a reckless driver. In one place, there was a sheer drop of several hundred feet from the edge of the road. He had heard there had been accidents on that road. He had never ridden with plaintiff any other time.

On re-direct examination by MR. ARNTSON: He considered plaintiff a very slow driver. When approaching another automobile, plaintiff slowed up or stopped, nearly always.

E. M. MOORE, a witness called for plaintiff, testified:

On direct examination by MR. ARNTSON:

Had known plaintiff 8 or 9 years; and never noticed anything the matter with him prior to the accident. He had met plaintiff quite often, while he was buying bonds for Carstens & Earles. He saw plaintiff after the accident at the stadium, on the same day. Plaintiff's clothes were mussed up and he was nervous. He had observed plaintiff since then, and would say he was getting into a "pretty bad fix."

Cross-examined by MR. OAKLEY:

He was doing business with plaintiff at the present time, had sold him bonds since he was in the present firm. He thought plaintiff was now in extensive business in that line. He dealt sometimes with plaintiff and sometimes with plaintiff's partners. He was at the stadium on the day of the accident, when Roosevelt spoke. He saw plaintiff at the high school at the stadium. Had no conversation with him there. Did not recall any indication on plaintiff's face of an injury. Did not remember about his overcoat. It was shortly after noon, if he remembered, somewhere around 1 or 2 o'clock. Quite a number of people had gathered in the stadium. He did not notice that plaintiff was out of his mind, or anything of that sort.

W. J. MURPHY, called for plaintiff, testified—

Examined by MR. ARNTSON:

Has known plaintiff five or six years. Before the accident, plaintiff seemed quite "spry". He was always active.

PETER MODAHL, a witness called for plaintiff, testified—

Examined by MR. ARNTSON:

Is a policeman of Tacoma. Sometime last spring, he met plaintiff on the street, staggering along. Thinking plaintiff was drunk, he stepped up to him and asked what was the matter with him; then, he found that plaintiff was not drunk. He has noticed plaintiff being subjected to indignities. Very often plaintiff gets in the way of people, and they stare at him. He had often helped plaintiff on or off elevators.

C. E. HORN, a witness called for plaintiff, testified:

Examined by MR. ARNTSON:

Has known plaintiff 7 or 8 years. Was next door neighbor to him in Seattle for about a year. Before the accident, plaintiff was a most active man, always doing something. He had never seen any one more active. Plaintiff was sick once and went east of the mountains, but when he came back he seemed as well as ever. Plaintiff used to ride a motorcycle. He went out with plaintiff on a launch sometime in the summer after the accident. Plaintiff was then not so lively and had trouble getting around in the boat. He seemed unable to do anything and had to have help that day. He

visited plaintiff since then and went to the mountain with him twice. At those times, plaintiff's condition was very bad. He did not seem to be sure of himself in the machine. Every time he had seen plaintiff, since the accident, he seemed worse. He had seen people look at plaintiff as though they thought him tipsy, and get out of his way.

H. P. PRATT, a witness called for plaintiff, testified:

Examined by MR. ARNTSON:

He is in the investment banking business, associated with plaintiff and P. B. Kauffman; and has been so engaged three years. Prior to the accident, plaintiff was an unusually energetic man, physically and mentally. Since the accident, his health has been poor. Had been associated with plaintiff in business a little over two years. Although in pretty bad physical condition, during the first months, plaintiff accomplished "quite a little work." His highest efficiency to the firm was during the first 3 or 4 months. Since that time, his efficiency had greatly diminished. At the present time, it was small. He generally works 5 or 6 hours a day now; during the first 3 or 4 months, he worked much longer. He is not able to accomplish as much in a given time as he could before. After working a few hours, he seems very much exhausted. He averages five days a week of work. The results accomplished by plaintiff are a small fraction of what he accomplished during the earlier days of his association with him. Plaintiff's greatest value

to the firm was when he was able to act as an outside man. Now, owing to his disability, plaintiff is valueless as an outside man. The business is done principally by going to the place where it is to be tranacted and effecting it by personal interview. In the course of the purchase of an issue of bonds. it is necessary to make an inspection of the land within the district covered by the bonds. At the time he entered into business with plaintiff, plaintiff had a particular grasp upon the bond business at Tacoma—a thorough familiarity with the contractor who was in the habit of having bonds to sell, with the city, with the district under improvement, and with all the details of the bond business. Plaintiff's interest in the business at the present time is between 25 and 30%.

MR. ARNTSON: Is that interest to continue?

MR. OAKLEY: I object to that on the ground that it is incompetent, irrelevant and immaterial.

THE COURT: Objection sustained. Exception allowed.

MR. ARNTSON: Please state whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?

MR. OAKLEY: I object to that.

THE COURT: The objection will be sustained. It is speculative.

Thereupon plaintiff prayed an exception to the

ruling, and the exception was allowed.

MR. ARNTSON: I offer to prove by this witness that, by reason of Mr. Henry's condition—his

inability to do business and to travel about as demanded by the business—matters have progressed to a point where they have had to carry Mr. Henry for some time, more as an act of charity than otherwise, and that the end has come, or will come within a short time, when he must sever his connection with this business. I offer to prove that as bearing upon the measure of damages as the result of his injury.

MR. OAKLEY: I wish to save an exception to the remarks of counsel just made in reference to carrying the plaintiff here as a charitable act, and discontinuance with the firm, as calculated to prejudice the jury.

THE COURT: The objection is sustained, and the jury instructed to disregard the offer. There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carries others around on pleasure excursions, himself. Counsel must be careful, so, if you get a verdict, it will stand, and not be continually fluttering around the border line of what is objectionable, in trying to get it in one shape or another. It will be more than likely to result to your prejudice than to do you good.

Whereupon plaintiff prayed an exception to the ruling and remarks of the court, which exception was allowed.

And, thereupon the court further instructed the jury as follows:

"The remarks of the Court are in a sense provoked by the counsel. The remarks of the Court would not ordinarily be justified, as you are the sole and exclusive judges of the facts in every case from the evidence. Counsel, by his offer, which he had no business to make in the form that he did—the Court felt it required some reprimand to call his attention to the fact, so that he would not repeat it. And, therefore, the remark was made."

Whereupon plaintiff prayed an exception to the instruction aforesaid, and such exception was allowed.

J. E. JONES, a witness called for plaintiff, testified:

Examined by MR. ARNTSON:

He was in the automobile business and had sold plaintiff two or three machines within a year and a half. He went once with plaintiff on a trip to Montesano; and, after they had driven 18 or 20 miles, he took the wheel away from plaintiff "because he seemed to get so bad—he did not seem to have full control". After he had driven awhile, plaintiff would not have the same control as at first. Plaintiff moved very much like a drunken man in getting in or out of the car.

P. B. KAUFFMAN, a witness called for plaintiff, testified—

Examined by MR. ARNTSON:

He is a member of the firm of Henry, Pratt & Co. of which plaintiff is a member. Had known plaintiff since he became associated with him in

October, 1911. When he first knew plaintiff, plaintiff seemed to have some hesitancy in walking; and. since then, has grown steadily worse, until it is almost impossible for him to walk at all. The actual work done by plaintiff at the present time is very small. Plaintiff comes down to the office when he is in absolutely no condition to be there. and endeavors to and does do some work. In the mornings, he does some work, but, in the afternoons he does practically nothing now. Plaintiff did a great deal more work at first. He worked early and late, in fact, more than anyone else in the office; but has steadily been doing less and less. On one occasion he took a trip with plaintiff to Yelm to examine into a proposition of some bonds issued by an irrigation company. Plaintiff started to drive the machine, but, after going a little ways, and not caring to risk his own life, the witness took the wheel and drove himself the whole day. They went over the entire property in the machine. It was necessary to use an automobile to enable plaintiff to get around at all. On several occasions he had assisted plaintiff home, when he seemed "to be played out."

DR. F. P. GARDINER, a witness called for plaintiff, testified—

Examined by MR. HAMMOND:

Had practiced medicine at Seattle since 1900; and had seen and treated affections of the brain and nervous system in a general way. First became acquainted with plaintiff at Seattle, in 1902.

In 1907, treated plaintiff for gastric ulcers, from which he recovered. On April 8, 1911, examined plaintiff, and found him bruised on the side, shoulder and arm. Plaintiff complained of pain about the head and of an uncertainty. He said he felt as though he were falling towards the side. Plaintiff told him he had been hurt, and complained of having vomitted blood, and of having been hurt in one of his ears. He kept plaintiff under observation two or three months after that. During that time, the gastric trouble ceased; but the nervous disturbance increased. Later, he felt that there was a disturbance at the base of plaintiff's brain—in the cerrebellum. In cases of injury to that organ, there is a lack of equilibrium. The gait is staggery, in a measure resembling that of a drunken man. The plaintiff did not improve under his treatment, so far as his nervous symptoms were concerned, they were more pronounced at the end of three months. Plaintiff then left Seattle. He had seen him once or twice since. Examined plaintiff about a week ago. His walk was then decidedly worse than before. Such symptoms as he saw in plaintiff could have been produced by a blow upon the head. Vomitting may be expected to follow an injury to the head or body. If the condition in which plaintiff now is is the result of an injury, he did not think plaintiff would recover, or improve. It might not shorten plaintiff's life, except as that it might invite other troubles. Assuming that, on April 6, 1911, in attempting to board a street car,

plaintiff was suddenly swung against the side of the car and received such a blow as to cause a discharge of blood from one of his ears; that, prior to such injury he had never shown any of the symptoms you have described, and soon thereafter the symptoms began to appear, and have gradually increased until he has reached the condition in which he was at the time of his last examination, in his opinion the present condition was caused by the injury. The fact that there was a flow of blood from the ear made it probable that the skull or some portion of it was fractured at the time of the accident.

Cross-examined by MR. OAKLEY:

The only sign of a fractured skull he noticed on his first examination of plaintiff was the disturbance of equilibrium. Though not pronounced, it was noticeable at that time. The plaintiff vomitted blood while he was treating him for gastric ulcers in 1907, for three or four months, frequently. He gave plaintiff the same treatment for his gastric trouble following the accident that he had given him in 1907. The hemorrhages ceased in two or three weeks. He made no examination of the ear and did not observe any discharge from it. The usual result of a fracture severe enough to cause the flow of blood from the ear is that the man is laid out, dangerously sick, and, as a rule, he dies. He would expect paralysis to follow—an inability to either feel or move—differences in sensation. The plaintiff suffers from muscular incoordination, or inability to have his muscles work in harmony. The

same result might follow from any disease of the cerrebellum-anything that would cause hardening or pressure. He had heard of locomotor ataxia. There is incoordination in that disease, but not such as plaintiff has. In a degree these symptoms are asserted in Friederich's ataxia. By ataxia, he meant any affection of those centers that control motion. The plaintiff was evidently suffering from a disturbance of the cerrebellum. It might be caused by anything that would cause pressure there, including trauma. Heredity is scarcely worth mentioning as a cause; there is a possibility of that. Syphilis will cause ataxias. He had never noticed any peculiarity in the gait of plaintiff before the accident. At the time he examined him, in April, 1911, there was nothing in the physical condition to lead him to suspect a fracture at that time. His attention was called and his treatment directed to the gastric trouble. He recovered from that. He was led at that time to suspect that there was an injury to the brain by the noticeable disturbance of the nerve center and the statement by plaintiff of his inability to know exactly where he was. He gave plaintiff the same treatments that he had given him formerly in 1907 for gastric trouble, and the gastric ulcers disappeared and the hemorrhages ceased. When he first examined the plaintiff the bruises were slight,-no skin was knocked off and discoloration was not decided, but noticeable. It was not real black, but partially so. It seemed to

have been a trivial affair and I went on and treated him for the old gastric trouble.

Re-direct Examination by MR. HAMMOND:

The plaintiff had been well for two years prior to the accident. The old scars from the gastric ulcers may have been torn apart by the injury. The cerrebellum governs and controls the muscles, causing them to act in harmony. Plaintiff's muscles do not act in harmony. In his opinion, plaintiff was not suffering from locomotor ataxia. As a rule, locomotor ataxia develops slowly. You would not be likely to notice it in two or three days or two or three weeks from the first symptoms. In locomotor ataxia there are sharp, shooting pains. He had not known plaintiff to have such pains—not particularly. In locomotor ataxia, the reflex of the pupil of the eye is absent as to light, but present as to distance. In the normal eye, the pupil contracts when suddenly exposed to light. It does not do so in locomotor ataxia. It does do so in plaintiff. The most common cause of locomotor ataxia is syphilis; there is no indication of syphilis in plaintiff. In cases of syphilis affecting the brain, the symptoms are of slow development; you would not expect them to follow a blow or injury to the head. Freiderich's disease comes on principally and generally in cases of young persons.

Re-cross examination by MR. OAKLEY:

He thought plaintiff was suffering from a disturbance to the cerrebellum. Freiderich's ataxia is a disturbance of that organ; locomotor ataxia is not. In that disease, the spinal cord is affected.

DR. D. A. NICHOLSON, a witness called for plaintiff, testified—

Examined by MR. HAMMOND:

Had practiced medicine at Seattle since 1905; had made a special study of affections of the brain and nervous system, and confines his practice to that work. He had made two examinations of plaintiff, the first in November, 1912. At that time, he found plaintiff suffering from a disease that interfered very materially with his walking and employing himself, where the muscles were called into play. There was some unsteadiness of the arms, and a decided unsteadiness in his gait. There was some disturbance of sensation in the hands, arms and legs. About two weeks before the trial, he again examined plaintiff. At that time, he found the same trouble in walking, in standing, and in using the legs, and in using the arms. There was considerable disturbance of the sensation in the feet, legs and hands, and there were small areas over the body in which sensation was lessened or changed. It would not be as acute to cotton wool, as it ought to be, or to the prickling of a pin; and there was some disturbance of sensation when he applied heat and cold—he could not distinguish between heat and cold. There was a slight curvature of the spine in the neck, the muscles of the left side of the neck were more developed than on the right side. There was a slight wasting of the muscles of the hands. The grasp of the right hand did not seem as strong

as that of the left. It ought to be stronger in plaintiff. Assuming that, in the spring of 1911, in attempting to board a street car, the plaintiff was suddenly swung against its side, and received so violent a blow as to cause a discharge of blood from one of his ears; that, prior to such injury, he had never shown any of the symptoms he had described; that, soon thereafter, the symptoms mentioned began to appear, and have gradually increased until he has reached the condition in which he was at the time he last examined him, he, the witness. would presume that the injury would be accountable for the condition found. He would not expect any improvement in plaintiff's condition. He would not be surprised if the disease should continue to progress; he would expect nothing better than that the disease would remain stationary. The tendency of such a disease is to progress. In his judgment, plaintiff is suffering from a disease of the cerrebellum, and, possibly, of the medulla. Such a disease might follow an injury or blow. Patients sometimes recover from fractures of the skull. Hemorrhages in the cerrebellum might cause disease of that organ. He had examined plaintiff to determine whether or not he was suffering from locomotor ataxia, and found no-one of the cardinal symptoms of that disease, and, for that reason, excluded it. The most frequent cause of locomotor ataxia is syphilis. He could find no evidence of that disease in plaintiff.

Cross-examined by MR. OAKLEY:

In his opinion, plaintiff was suffering from cerrebellar ataxia. That may be produced by any disease of the cerrebellum, such as a new growth, an abscess, syphilis, tuberculosis, a disease of a blood vessel, or small hemorrhages—anything that will destroy cerrebellar tissue or brain substance. He could not tell which of these causes was most frequent. There was a form of cerrebellar ataxia which seems to be based upon inherited conditions, but that form occurs largely in children, it might occur beyond the period of 30 years. He had known cases where pernicious anemia had caused cerrebellar ataxia. He had been able to find cases in the authorities in which trauma was attributed as the direct cause of cerrebellar ataxia. He could not recall what authorities, but would cite the present case as one. He examined plaintiff's lungs and found no evidence of tuberculosis.

Re-direct examination by MR. HAMMOND:

He was satisfied that the condition of plaintiff could have been produced by a blow on the head. He had noticed no evidence of anemia in plaintiff. We do not inherit tuberculosis. He had discovered in plaintiff no symptoms of either tuberculosis or syphilis.

DR. J. W. SNOKE testified that, in April, 1912, he examined plaintiff and had examined him several times since then. In his opinion, plaintiff was suffering from cerrebellar ataxia, and that, assuming that, on April 6, 1911, in attempting to board a

street car, plaintiff was swung against its side and received so violent a blow as to cause a discharge of blood from the ear; that prior to such injury he had never shown any of the symptoms such as he now presents; and that, soon thereafter, the symptoms mentioned began to appear, and have gradually increased until he has reached the condition in which he was at the time of his last examination. his present condition was due to the injury received at the time of the accident. He had found no evidence of syphilis or tuberculosis in plaintiff. thought plaintiff would not recover; and would expect him to become worse, and that, within a few years, he would be unable to walk at all. Freiderich's ataxia is a form of cerrebellar ataxia that usually runs in families, and develops before puberty. He would not say that cerrebellar ataxia was very seldom the result of trauma. Common causes are tumors, involving the cerrebellum, abscesses, tuberculosis, syphilis and hemorrhages.

DR. CHARLES R. McCREARY, testified that he examined plaintiff first in October, 1912, and had examined him several times since. In his opinion, plaintiff was suffering from cerrebellar ataxia, and, assuming the facts relating to the accident to be as claimed by plaintiff, the condition was due to the injury received at the time of the accident. He did not think the plaintiff would improve, but, rather, expected the time would come when he could not walk at all. He had examined plaintiff for syphilis and found no evidence of it.

DR. CHARLES JAMES testified that he had treated plaintiff more or less continually since May, 1911; had done everything he knew to do, but the patient had gradually grown worse; and, in his opinion, the time would come when plaintiff could not walk. He thought plaintiff's life would be shortened by the disease. His general debility would prevent the exercise needed to keep plaintiff in health.

ALBERT OLSON, a witness called for defendant, testified—

Examined by MR. OAKLEY:

He was the motorman on the car at the time of the accident. He was shown defendant's Exhibit. A, introduced in evidence, and said it was an exact representation of the car. At the time of the accident, he was at the front end, and had no view back in the car. Defendant's Exhibit C, in evidence, is a fair representation of the car. There was a looking glass at the front end of the car so adjusted that, by looking into it, he could see the steps at the entrance to the car. It gives a view of about two feet into the street. He stopped the car and some passengers got on at the time of the accident. He got the signal to go ahead, looked in the glass, saw that everything was clear on the step, and started up. He saw nothing of the accident. He first learned that an accident had happened at the depot on the same trip. The conductor told him of it. He did not see plaintiff before the accident. The place of the accident was a regular

stopping place for the car. All cars stopped there, whether there were any passengers or not. He got no signal to stop the car after he started up. He thought the first stop was at the Union station, but could not remember.

Cross-examined by MR. ARNTSON:

The conductor's name was Mathieson. His statement that he had looked in the glass was based upon the fact that he usually did so and not upon his recollection of this particular instance.

ARTHUR S. BATSON, a witness called for defendant, testified—

Examined by MR. OAKLEY:

He was seated on the car directly opposite the entrance at the time of the accident. The car stopped. He had a clear, unobstructed view of the entrance. but saw no one enter the car. The car started on, and, very soon, he heard the remark passed that somebody had hurt his wrist, but it was said in such a jocular manner, that he did not pay much attention to it. He had a faint recollection of seeing a man board the car before it started; that the man "kind of made a slight slip," but seemed to get on the car all right afterwards, "just like he might have struck the second step in place of the first he kind of slipped from the second step to the first and then recovered himself. He thought the car had not gone over half its length before that incident occurred. After plaintiff got on the car, he took the second seat on the east side of the car. He did not notice anything to indicate that plaintiff was in

a dazed condition; and thought plaintiff's complaint that his wrist was hurt was made in a jocular manner. He did not hear him say anything further to the conductor. He did not remember seeing any blood coming out of plaintiff's ear or running down his face; he did not see anyone take a piece of paper and write anything and place it in plaintiff's pocket. To the best of his knowledge, there was no evidence of the accident taken at the time. After the car started, there was no stop until it reached the depot and at the end of the line. The conductor was standing behind the center rail of the main entrance of the car. There was a student conductor on the car who was standing in front of the center rail. From where witness sat he could have seen a man if the man had had his left hand on the rear hand hold and was dragging alongside the car and struggling to get on to the step; and he saw nothing of that kind.

Cross-examined by MR. ARNTSON:

He could not swear as to the exact spot where the conductor stood at the time of the accident. He was not two-thirds back in the smoking department.

MARTIN MATHIESON, a witness called for defendant, testified—

Examined by MR. OAKLEY:

He was the conductor in charge of the car at the time of the accident. About 12:15 o'clock he made the regular stop at 21st Street. There were no passengers to get on there. The car stopped 5 or 10 seconds, he saw that everything was clear, and the

student conductor gave the bell to go ahead. The car had gone about half its length, when a passenger swung on. "he kind of slipped like, but, as near as I can remember, he grabbed the front handhold and kind of swung himself on. He kind of slipped back, and his side kind of struck up against the car, and he complained of hurting his wrist when he got on the car, and he said that we had started the car too quick. That is all I remember that was said." The witness was standing at the time right back of the center rail at the entrance to the car. When he first saw him, plaintiff was running alongside the car. The car had gone, he should judge, about half its length, and was moving at the rate of two and a half to three miles an hour. He did not recall any passengers getting on. When plaintiff got on, he went into the back part of the car; could not say what seat he took. Roberts (the student conductor) was collecting the fares. He did not remember that anyone was attempting to board the car at the time the signal was given to start. Plaintiff complained that they had started the car too quick; and that he had hurt his wrist. He was in position to have observed whether or not plaintiff got on the car, put his right hand on the main post running up through the center of the entrance, his left hand on the back handhold, and the car started suddenly with a jerk and threw his hand off this center rail, and threw him, and dragged him several feet along the street, before he succeeded in struggling on the steps of the car, and saw nothing of the

sort. The plaintiff finally entered the car through the entrance in front of the central rail. He saw no blood flowing from plaintiff's ear; nor did plaintiff's clothes look torn or dirty, that he could see. He did not see anyone write any note and put it in plaintiff's pocket. At plaintiff's request he assisted plaintiff in obtaining the names of the witnesses of the defendant, including Mr. Batson and Mr. Roberts. Plaintiff told hi mthat the corporation had no mercy on him, because they had discharged him and wanted him to testify for plaintiff, but he informed plaintiff that he would tell the truth no matter for whom he testified. He had been discharged by the defendant company for failing to collect fares; was not employed by them at any time during the trial and had no interest in the outcome of the action.

Cross-examined by MR. ARNTSON:

He would not swear that no other passengers got on at the time of the accident. He was in charge of the car. Roberts was a student conductor under him, being broken in. The plaintiff swung on to the car just before bells had been given to stop. "It happened so quick, kind of struck against the side of the car, just swung around and swung up a few seconds later." Plaintiff struck the side of the car after he got on the steps. His first act was to run along side of the car; and just as he got on to the car, he grabbed the front handhold. The side of his body struck against the "inside end" of the car. He was swung forward so as to hit that side.

Plaintiff's feet were on the first or second step when he struck against the car.

ALBERT OLSON, recalled for defendant, further testified—

Examined by MR. OAKLEY:

The car was equipped with an appliance to prevent the jerking of the car when starting. A car that had moved its length after starting would be going about three miles an hour. He did not remember whether, at the time of the accident, this car was started with a jerk. "It was started about the same as we always do."

Cross-examined by MR. HAMMOND:

He had had considerable experience on those cars, and had known them to jerk, sometimes, when they started.

DR. H. W. DEWEY, called for defendant, testified—

Examined by MR. OAKLEY:

Had examined plaintiff and believed him to be suffering from cerrebellar ataxia. The general causes of that disease are blood conditions and diseases of the arteries which cause hemorrhages, breaking down of the arteries and the lodging of the blood in that part of the brain, a blood taint causing growths or tumors in that part of the brain—any disease that might effect the cerrebellum. He did not think a tubercular condition would cause it; such condition usually affecting the membranes and not the brain itself. He had never heard of a case of cerrebellar ataxia being produced by

trauma or read of such a case, and could hardly see how it could be produced in that way without a fracture of the skull covernig that part of the brain. He had looked but had found no authority stating trauma was a cause of the disease. A person receiving a blow so violent as to fracture the skull and cause blood to flow from the ear would probably be unconscious and die. He had seen many and had never known one that did not die.

DR. EDWARD A. RICH, a witness called for defendant, testified—

Examined by MR. OAKLEY:

Cerrebellar ataxia is a disease of extreme severity, which occurs only where there are tumors or syphilis of the cerrebellum, and is practically unknown in other conditions. In an experience of many years, the only cases he had known were caused by tumors. The authorities, however, claim that the disease may be due also to syphilis, a chronic closue, to crushing and severe injuries, causing a destruction of the cerrebellum. There is a transient cerrebellar ataxia due to hemorrhage. A vessel in the cerrebellum may break, and blood flowing out might cause ataxia for a little while; but as quickly as the blood absorbed, the symptoms would pass away. He had never known a case where a blow fracturing the base of the skull had caused the disease. Pernicious anaemia is stated as one cause of the disease, by the authorities. The ordinary form of cerrebella ataxia is apt to be hereditary. Fracture of the skull at its base almost always results in death. If not, it generally results in paralysis. Cerrebellar ataxia is more or less of a pregressive disease, becomes worse and worse, and the patient finally succumbs to some other disease.

DR. H. M. REED, a witness called for defendant, testified—

Examined by MR. OAKLEY:

Examined plaintiff on April 24, 1911, for the defendant. At that time, plaintiff would not remove his shirt, and he made the examination without. At that time, plaintiff claimed to have received bruises as the result of being dragged some distance by a street car. He complained of his stomach, and of having vomitted blood. He did not then exhibit any symptom of an injury to the brain. There was no unsteadiness in his gait. He said nothing about his ear. He said he had bruised his head, nothing to show that he had sustained an injury to his head aside from his statements. He had not seen plaintiff since then until now. ordinary causes of diseases of the cerrebellum are sypilis, new growths, and degeneration caused by affections of the blood vessels,—any cause interferring with nutrition of the organ. Inheritance has been laid down as a cause. He would not say it was impossible for it to be caused by trauma; but it is not laid down by the authorities that that is one of the causes of cerrebellar ataxia. organ is so protected by its position and by overlying muscles that it is not likely to be injured.

Cross-examined by MR. HAMMOND:

Unusual results sometimes come from injuries to the head. He had been testifying concerning the usual results of such injuries.

The PLAINTIFF, called in rebuttal, testified—Examined by MR. ARNTSON:

That Mr. Mathieson, the conductor, had stated to him that the first he remembered of seeing plaintiff was when plaintiff came up into the car; and that he (Mathieson) was then back perhaps half way between the entrance and the rear of the car, talking to a man.

J. WESLEY ROBERTS, called for plaintiff in rebuttal, testified—

Examined by MR. ARNTSON:

He was on the car of defendant as a student conductor; at the time of the accident, he was standing in front of the central rail at the entrance; Mr. Mathieson, the conductor, was standing about the middle of the smoking compartment, talking to some man. The car stopped and some four or five passengers got on-ladies and gentlemen. He noticed a man among them whom he has since learned to be the plaintiff, here. A lady and gentleman got on at the front side of the central rail, and two ladies got on at the back. Plaintiff stood aside to let the ladies get on at the back; and, as the gentleman got on in front, he looked around where they stood to get their fares. The conductor said, "All Right," and witness gave the motorman the bell to go ahead, without looking around at the

steps. After he gave the bells, he noticed plaintiff reaching with his right hand to grab the iron post in the center of the entrance. Plaintiff already had hold of the rear handhold with his left hand. As the car went forward, it swung plaintiff around to the side, holding on with his left hand. The car went about ten feet before it stopped. After the car stopped, plaintiff got on. All he heard plaintiff say was that he hurt his wrist. The witness went on and collected his fares in the front part of the car and then came back to where Mathieson was talking with plaintiff. He noticed blood on the right side of plaintiff's face. When he first saw plaintiff, he was among the passengers while the car was standing still. When he next saw him, the car was in motion. Plaintiff had one foot on the step when the car started. At that time, witness was watching where the passengers were sitting so as to get their fares. Plaintiff got off at 9th street. The witness signalled for the car to stop as soon as he discovered plaintiff's position. He couldn't see plaintiff's body at that time, but could see his head and arm.

Cross-examined by MR. OAKLEY:

He was discharged from the employment of the defendant for shortage in fares. He was 17 when he went to work for defendant, in 1911, and told it he was 21 to get the job. On April 14, 1911, he signed a statement for defendant, in which he said that about 12:15 p. m., the car stopped. "One man boarded the car, and, as there was no one else to

get on, he gave the motorman the signal, and the car started. After it had gone a few feet, I noticed a gentleman standing to the right of the track and still north of the crossing, and as the car entrance passed him, he took hold of handle and boarded the moving car very nicely." The statement was not true, was not written by him, he did not know that he had ever read it, and supposed he would have signed anything at that time. He had signed defendant's "Exhibit C," which was offered and received in evidence. He had lied to defendant twice, once in stating his age, and again in signing that statement. He had, several times, during the last two weeks, said to Mrs. Norris, with whom he was boarding, that after this trial was over he and plaintiff were going to take a long trip. Plaintiff had told him something about a trip he was going to take around the world; that the doctors advised him to take. Plaintiff told him, about a year ago, that he had got his (plaintiff's) ticket for a trip around the world, and also had a lady nurse hired to go with him; but, as plaintiff got sick, or worse, it was impossible for him to go at that time. So he told the witness, he had made up his mind to go now. Plaintiff had told him that, two or three weeks before the trial. Plaintiff told him that, when the case was over, he was thinking of taking his automobile and the witness and drive from Tacoma to San Francisco, and taking the boat there. Plaintiff had asked the witness if he would like to go with him, and witness told him

he would. Plaintiff had then said he would write to the mother of the witness and ask her opinion on it. He did, and she consented. Plaintiff had said, from the time they left until they got back, the trip would last 8 or 10 months. Plaintiff was going to take his automobile on the boat. He did not know that anything was mentioned about his testimony in this case. He did not believe plaintiff ever came right out and asked him to testify for him. Plaintiff wanted to know some particulars about the case and so on. He could not tell at the present time just what plaintiff did say. He had gone automobiling with plaintiff half a dozen times; and had had the machine at his disposal; had driven it.

EDITH P. CURTIS, caled for plaintiff, testified that she was a sister of plaintiff, forty-five years of age, and had never known or heard of any member of her family being afflicted with such a disease as plaintiff was affected with; and had never heard of any member of her family, or of her ancestors, father, mother, grandfather or grandmother having cerrebellar ataxia.

MARTIN MATHIESON was recalled by plaintiff—

Examined by MR. ARNTSON:

Q. I show you defendant's Exhibit G, being a form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?

MR. OAKLEY: I object to that. It was intro-

duced simply for impeachment purposes of Roberts. It is not in rebuttal of anything introduced.

MR. HAMMOND: It is not rebuttal, but it is the first time we knew of any such thing. It is part of our cross-examination, for the purpose of showing, if we can, that this witness (Mathieson) has a direct, positive interest in the result of this case.

The COURT: Objection sustained. It is not rebuttal.

MR. HAMMOND: I don't think it is properly rebuttal; but I ask the privilege of calling the witness for further cross-examination in order to show this. This is the first time it has come to our knowledge that employes of defendant were bound in this way. It seems to me material, if we can, to show that this witness is bound, so far as the law can do it, to make good to the defendant any verdict that might be rendered in this case.

The COURT: Motion denied.

Whereupon plaintiff prayed an exception to the ruling, and such exception was allowed.

MR. HAMMOND: I will ask the same privilege as to the witness Olson, and ask leave to prove by him that he has signed a similar contract.

The COURT: Assuming that the same objection will be made?

MR. HAMMOND: Yes.

The COURT: Objection sustained, motion denied, and exception allowed.

The plaintiff requested the court to charge the

jury, among other things, as follows, to-wit:

I.

"It is admitted by the pleadings in this case that, at the time alleged, one of the defendant's cars stopped to take on passengers, and that an accident occurred; and, if you shall find from the evidence that plaintiff was at the car before it started, for the purpose of boarding it as a passenger, and that as he was about to get on, the car started and, in consequence thereof, he was injured, the defendant is liable, unless you shall believe from the evidence that the agents of the defendant in charge of the car exercised the highest degree of care and diligence to ascertain his danger and avoid the accident with the operation of the car."

## II.

"The law presumes that, at the time of the accident, plaintiff was exercising all the care for his own safety that would be expected of persons of ordinary prudence in boarding the car under the circumstances disclosed, and, in the absence of evidence sufficient to satisfy you that he was not in the exercise of such care, the burden rests upon defendant to prove that its whole duty to plaintiff was performed and that the injury was unavoidable by human foresight."

## IV.

"Not only was it the duty of defendant's agents to allow plaintiff a reasonable time in which to board the car, if he was present at the time it stopped or before it started for the purpose of getting on, but it was their duty to see to it that the car was not started again while the plaintiff was in the act of getting on or in a place where he would be exposed to danger in case the car were to be moved. In other words, stopping the car a reasonable time to allow plaintiff to get on to it would not of itself be sufficient, but it was the duty of the conductor to see and know that the plaintiff was not either in the act of boarding the car or in a dangerous position in case the car should move before starting the car; and, if he failed in that duty, and plaintiff was injured, defendant is liable."

V.

The defendant is held to the highest degree of care, skill, and diligence for the safety of persons about to board its cars consistent with the conduct of its business. This car was under the control of the agents of defendant and they were bound to know, if by the exercise of extraordinary care, caution and diligence they could know, whether plaintiff was attempting to board its car at the time of the accident, before permitting the car to start in such manner as would be liable or likely to injure him, and if, in consequence of even slight neglect in the performance of such duty, plaintiff was hurt, defendant is liable.

## VI.

Sound public policy requires that street car companies be held to the strictest diligence and care to prevent injury to persons while getting upon their car as passengers; and if you shall believe from the

evidence that, before starting this car, the conductor did not do all in his power, consistent with performance of his other duties upon it, by looking, listening, inquiring, or otherwise, to ascertain whether plaintiff was present and in the act of getting on, or was where he would be liable or likely to be hurt, and to avoid injuring him, and that, in consequence of the failure of the conductor to discharge his full duty in that respect, plaintiff received the injuries complained of by him, defendant is liable.

#### VII.

In boarding this car, plaintiff was bound to use only such care as an ordinarily prudent man might be expected to use under like circumstances in view of the probable danger in doing so; and, in determining whether, in this instance, he did exercise such care, you should take into account the circumstance that the conductor owed to plaintiff the highest practicable degree of care to avoid injuring him, and that plaintiff was entitled to expect the conductor to perform such duty.

## XI.

If you shall believe from the evidence that, in taking hold of this car and holding to it, if he did take hold of it and hold on as he has testified, the plaintiff did not exercise all the care to be expected of an ordinarily cautious and prudent person to exercise, but, nevertheless, shall believe that the injury to him, if any, was due to a sudden movement of the car, unexpected by him, brought about by

the failure of those in charge of the car to ascertain his position and danger before putting the car in motion, and that, by the exercise of extraordinary care and diligence on the part of such persons, consistent with the operation of the car, the accident could have been avoided, the defendant is liable.

#### XII.

If you shall find from the evidence that the injury complained of was inflicted and was due to the failure of the conductor or other persons in charge of the car to exercise the highest diligence and care to avoid it practicable to be exercised, the defendant is liable unless you shall further find from the evidence that plaintiff failed to use the care for his own safety generally exercised by persons of ordinary caution and prudence under like circumstances in getting or attempting to get upon such a car; and, even then, if you believe from the evidence that such failure to exercise care on the part of plaintiff was merely the remote, and the want of care and diligence on the part of the agents of defendant was the direct and immediate cause of the accident, defendant is liable.

## XIII.

In this class of cases, the fact that plaintiff was injured without apparent fault on his part, is sufficient to establish negligence of defendant, and to cast upon it the burden of proving that the injury could not have been avoided by human foresight; and, if you believe from the evidence, that plain-

tiff, when attempting to board this car, did what men of ordinary prudence usually do under like circumstances, and was, nevertheless, injured, unless you are further satisfied from the evidence that the agents of defendant in charge of the car did everything in their power consistent with their other duties that human foresight could suggest to ascertain the presence and situation of plaintiff, and to avoid injuring him, your verdict must be for plaintiff.

XIV.

If you shall believe from the evidence that, by reason of some disease or condition, inherited by plaintiff or otherwise acquired, he was at the time of the accident already predisposed to nervous affections or diseases such as he exhibits at this time, if he exhibits any, such fact will not of itself excuse the defendant, or render it less liable in this action. The cars of defendant are not operated for the sole use of healthy persons, but for the use of all persons without regard to their physical or hereditary weaknesses; and the defendant is chargeable with notice that persons of different bodily conditions and predispositions to disease will board their cars. It is reasonable to be expected that, in certain cases, if an injury happen to a person already predisposed to affections of diseases of nervous system, such injury may cause such affections or diseases to develop, or, if at the time of the injury such affections or disease have already developed, that the cure of them may be retarded or prevented entirely by the hurt.

### XV.

If you shall find for plaintiff, and that his present condition is the natural result of his injuries, he is entitled to recover such sum as, in your judgment, under all the circumstances disclosed by the evidence, will fairly compensate him.

## XVI.

In case you shall find for plaintiff, he is entitled to be made good, so far as money can do it, for any damages he may have suffered, and, in considering the sum to be awarded him, you should take into account every circumstance proven to your satisfaction by the evidence, tending to show a damage to him which you believe to be the natural and proximate result of the injuries suffered by him, including—

(a) Any pain he may have suffered or will probably be suffered by him in future resulting from the injury;

(b) Any mental distress he may have suffered or is likely to suffer in future resulting from the injury, such as a sense of humiliation or mortification caused by the acts or conduct of persons whom he has met or may meet induced by his appearance and condition arising from his injury;

(c) Any anxiety or danger he has been or may be subjected to because of the conduct of dogs induced by his appearance or acts arising from his injury.

(d) Any loss of earning capacity he may have

suffered or is likely to suffer in future because of the injury suffered by him;

- (e) Any loss of enjoyment of life he may have suffered or is likely to suffer in future in consequence of his injuries;
- (f) Any expenses he may have reasonably incurred in efforts to cure or obtain relief from his injuries to the present time;
- (g) Any other circumstance which has been proven to your satisfaction by the evidence which, in your judgment, adds to the damages suffered by him in consequence of his injuries.

The court declined to give either of the foregoing instructions, whereupon, before the jury retired, the following occurred:

Mr. Hammond: I desire to except to the refusal of the court to give each of the instructions requested by the plaintiff.

The COURT: Exception allowed to the refusal to give each instruction requested.

The court instructed the jury as follows, to-wit: Gentlemen of the jury: The Court will instruct you concerning the law in this case before you retire to determine upon your verdict. You will take with you to the jury room all of these Exhibits that have been admitted in evidence and also the pleadings in the case. It is your duty to resort to the pleadings to determine just what the difference is between the parties to this case, that is the reason they are sent out there with you so that if you do not thoroughly understand the issues between the

plaintiff and the defendant, you will have the pleadings there so you may settle the matter. In order that you may have the matter clearly before you while the instructions are being given, I will state to you briefly what the pleadings disclose.

The plaintiff came into Court with a complaint and charges in effect that the defendant was running a street car line here in this city carrying passengers; that on the 6th day of April, 1911, about eleven o'clock, one of its cars stopped at 21st and Pacific Avenue for the purpose of taking on passengers, and that while he, the plaintiff, who was there for the purpose of taking this car as a passenger, was in the act of getting on the car, he describes the situation he was in in his complaint,—the car was suddenly started forward by the agents of the defendant in charge of the car, which caused his injury. He charges that he has been damaged by reason of the negligence of defendant in starting the car as quickly as it did when he was in the act of getting on, and the injuries that were caused by that negligence amount to \$50,000. He testifies to certain amounts as having been incurred as doctor bills and destruction of certain personal property, and sums it all up in a prayer for \$50,000.00 and asks for such other relief as the Court will deem him entitled to. You will disregard that part of his prayer. So far as you are concerned his prayer is for \$50,000.00. In his complaint he also charges there was defective construction of the car. You will disregard any allegation that the car was defectively constructed, because there was no evidence to support that allegation, and it has not been argued to you by defendant's counsel.

The defendant comes into Court with an answer and denies it was negligence, and denies its negligence caused any injury to the plaintiff, and alleges affirmatively that if plaintiff was injured at all he was injured by his own negligence in trying to get on the car after it started. The plaintiff then comes in with a reply and denies that he was at all negligent in getting on the car. You will see that it is here alleged by the plaintiff that the defendant was negligent, and an allegation by the defendant that if the plaintiff was hurt he caused it by his own negligence. That renders it necessary for the Court to advise you concerning what under the law negligence would consist of on the part of the plaintiff and the defendant. The defendant was at this time what is known in law as a carrier of passengers, a common carrier. So far as the safety of its passengers are concerned, it is bound to exercise the highest degree of care consistent with the proper operation of its cars. That is about as much as the Court can tell you concerning what its duty is. If it fails to exercise that degree of care, and the failure on its part to exercise such degree of care results in an injury to a passenger, and the passenger has not himself been negligent, the carrier would be responsible. The Court may go farther and tell you that when a street car stops at a

street to take on passengers, that it is the duty of those in charge of the car to allow it to remain there at the time the car stops in order for them to get on the car sufficiently to be in a safe position, unless they have got on before,—that is unless they got on in time that was less than was reasonable, they might so accelerate their movements so they would not require what would ordinarily be reasonable time,—but, speaking generally, it would be the duty of those in charge of a street car to allow it to remain there stationary a reasonable time for those who were there to reach a safe place on the car. It would be the further duty of those in charge of the car to exercise due care, for them to wait such a reasonable time to ascertain that no passenger was in the act of getting on the car before they started, but, if those in charge of the car allowed it to remain a reasonable length of time for those that were there to get on the car, and when it had so remained such length of time that there was no one in the act of getting on the car, there would be no negligence or want of duty on their part, if they would start up the car even though someone was running toward the car to catch it.

The Court has used in these instructions the expression, "act of getting on the car." That does not mean someone trying to catch the car; it means someone in contact with the car, and in the actual act of climbing upon it, getting upon it. So far as the plaintiff himself is concerned, he, like the plain-

tiff in any other negligent case, cannot recover if he contributed in any way to the happening of the accident that resulted in his injury by his own negligence, that is, his own want of ordinary care. was bound to exercise ordinary care in getting on the car and to refrain from attempting to board a moving car, which the Court instructs you would be negligence on his part, and if it contributed to his injury, he could not recover. As far as this case is concerned, the Court will instruct you that if he attempted to board the car after it started, then he cannot recover because it is negligence as a matter of law. As I told you, in defining the plaintiff's negligence which would debar his recovery,—I use the expression, "ordinary care." So far as the plaintiff is concerned, the negligence which the defendant charges against him is what is known as want of ordinary care. Ordinary care is defined as being that degree of care that a careful and prudent person would exercise under like circumstances and should be proportioned to the peril or danger reasonably to be apprehended from a want of proper prudence.

In this case you will first determine whether the plaintiff has made out his case. He must show by a fair preponderance of the evidence the truth of the allegations in his complaint, the material allegations in his complaint,—that is, he must show by a fair preponderance of the evidence that the defendant is guilty of the negligence which he describes in his complaint and that that negligence

resulted in some, at least, of the injuries that he has described in his complaint and the amount of damage that he has suffered by such injuries. As I say, you will first inquire into whether he has established those things by a fair preponderance of the evidence. If you find that he has, you would then direct your inquiry to ascertaining whether he, himself, had been guilty of negligence which contributed to his own injury. If he failed to establish by a fair preponderance of the evidence that the defendant had been guilty of the negligence he describes, or fails to show by a fair preponderance of the evidence that that negligence was the proximate cause of his injury, he cannot recover. Likewise, if it is shown by a fair preponderance of the evidence that he is guilty of negligence himself which contributed to his injury, he cannot recover.

In these instructions so far I have used the expression, "proximate cause," and, "preponderance of the evidence." Regarding the preponderance of the evidence, which I have told you plaintiff must produce to support the allegations of his complaint, the Court instructs you it means that evidence which is of such a character, so persuasive and so appeals to your reason and understanding and experience as to create and induce belief in your mind, and if there is a dispute, that evidence preponderates which is sufficiently persuasive and convincing in character to create and induce belief in your minds in spite of what has been brought out by the other side in the way of argument or evidence.

That is about all the Court can tell you about preponderance of the evidence. It has been defined as the greater weight of the evidence, but evidence cannot be weighed in exact terms as we ordinarily understand that expression.

The Court has told you that the plaintiff could not recover unless defendant's negligence was the proximate cause of his injury. The Court instructs you, as far as proximate cause is concerned and its definition, the law exacts that every person shall be responsible for all those consequences flowing naturally and directly from his voluntary acts. The law does not hold anyone responsible for those consequences which do not flow naturally and directly from his acts. You will understand that a common carrier in the situation of the defendant could not hurt a sick man with impunity, that is, they would be responsible, if, through their negligence, they injured a sick person. They would be responsible, he, himself, not being negligent, they would be responsible for his sickness. You would have understood that, I presume, without any instruction from the Court. Certain of the arguments have induced the Court to so instruct you.

If you should find for the plaintiff under the instructions I have and will give you, it will then be your duty to fix the amount of his recovery. You would only allow him such an amount as under all of the evidence and circumstances of the case would fairly compensate him for the injury he has sustained as the direct result of defendant's negli-

gence,—in place of, "injury," I should have said, "damages." In assessing this amount, if you arrive at that point in the case, you will take into consideration all that the evidence has shown concerning those injuries, what, if anything, has been shown concerning the pain he has endured, mental or physical, as the direct result of that injury, the extent, if any is shown, to which it has impaired his earning capacity and his ability to take care of himself, any medical attendance that has been required as the direct result of the injury. There has been an argument made and some testimony upon which that argument was based, concerning the likelihood of his continuing to suffer and continuing to have an impaired earning capacity and being obliged to incur future expense for medical attendance and treatment. So far as the future is concerned in those matters, a stronger evidence is required to justify you in allowing anything for the future on that account than for what has taken place in the past. Before you can allow anything for future disability or pain or expense in those matters, you must find from the evidence that it is reasonably certain that such will ensue.

A while ago, the Court instructed you regarding contributory negligence. Before that time, I instructed you about the burden of proof resting upon the plaintiff to establish the defendant's negligence and that that negligence was the proximate cause of his injury. When the defendant comes into Court and alleges that the plaintiff was guilty

of negligence, contributing to his injury, if he was injured, as far as that contributory negligence is concerned, the burden of proof, the duty of establishing that by a fair preponderance of the evidence, rests upon the defendant and it does not rest upon the plaintiff to establish by a fair preponderance of the evidence that he was in the exercise of ordinary care, that is, unless plaintiff's own testimony shows that he was not.

Concerning the amount of damages, if you reach that point in the case and you find it necessary to assess damages, the Court will instruct you that there was one argument used by counsel that was somewhat misleading. He argued to you that the plaintiff would be entitled to recover, if his earning capacity had been \$100.00 a month, and his expectancy of life was twenty-six years, that you would on that alone be warranted in giving him a verdict of \$31,000.00, \$100.00 per month for twenty-six years. That would not be true, because you would have to think but a moment to see that the \$100.00 that he would receive for his last month's work at the end of twenty-six years would not now be worth \$100.00; it would not be worth \$50.00. \$31,000.00 at six per cent interest for twenty-six years would amount to \$50,000.00 and more and you would have the \$31,000.00 left. Figuring from that alone, it would be, as I say, greatly in excess of what would be warranted by that testimony alone.

I will read you certain instructions, and insofar

as they may be repetitions of what I have already told you, though you will give them due consideration, you will not come to the conclusion that because they are repetitions that the Court is trying to impress upon you one phase of the case more than another.

I instruct you that the law presumes nothing in favor of the plaintiff or of his allegations in the complaint, and the burden of proof is on him at all times to establish affirmatively by the fair preponderance of the evidence of his allegations of negligence against the defendant company. The fact that an accident may have occurred to him and that he may have sustained injury while attempting to board defendant's street car at 21st street and Pacific Avenue on or about the 6th day of April, 1911, raises no presumption of liability against the defendant company.

Plaintiff must prove by the fair preponderance of the evidence that as he was entering defendant's street car as described in his complaint said car was by and through the carelessness, negligence or incompetency of the defendant's servants and employes started forward with a sudden jerk without warning to the plaintiff, whose position as above described was then known to the defendant's servants and employes, or would have been known to them had they exercised due care in the operation of said car. And if you find from the evidence that on this point the evidence for the plaintiff and the evidence for the defendant is evenly balanced in

your minds, your verdict must be for the defendant, because the plaintiff has failed in his proof.

Before the plaintiff can recover, he must also go further and follow this proof with other proof and must likewise establish by the fair preponderance of the evidence that the injuries which he claims he suffered, are the direct and proximate result of the negligence of the defendant's mployes, as set forth in the complaint, and if the evidence on this point is in your minds evenly balanced both for the plaintiff and against the plaintiff, your verdict must be for the defendant, because the plaintiff has again failed in his proof.

The defendant charges that this accident was the result of the carelessness and negligence of the plaintiff himself, in that he heedlessly, recklessly, and carelessly attempted to board one of defendant's cars while the same was in motion; that it was contrary to the rules and orders of the defendant company for passengers to attempt to board a moving car.

I instruct you that if you find from the evidence in this case that the plaintiff undertook to board said car while the same was in motion and was injured thereby, this would be contributory negligence on his part barring a recovery. As I have before instructed you, so far as the defense is concerned, the burden of establishing it rests upon the defendant.

You are instructed that the plaintiff in this case would not be a passenger within the meaning of the law unless you should find from the evidence that he was actually attempting to board said car exercising reasonable care and prudence on his part, before the conductor gave the signal for the car to start, or that said plaintiff had made known his intentions to board said car by signalling the motorman or conductor, or was standing in such a position as to indicate his intentions to board said car in such manner as reasonably prudent and careful persons ordinarily board street cars, under like circumstances, and that the conductor either saw or in the exercise of reasonable care should have seen his intentions so to do, before signalling for said car to start.

You are further instructed that if you believe from the evidence that at the time of the accident the plaintiff attempted to board said car while the same was in motion he cannot recover damages from the defendant, because he assumed the risk of being injured by attempting to board said car. The defendant company cannot be held liable for mistakes in judgment made by passengers in attempting to board moving cars.

You are instructed that if you believe from the evidence that the street car of the defendant was put in motion before plaintiff had attempted to board the same this fact would not authorize or make it right for the plaintiff to commit an act of negligence in attempting to get upon said car to prevent being left behind.

If you find from the evidence that both the plain-

tiff and the employes of the defendant company were negligent and that this accident resulted from the joint or concurring negligence of the parties, that is, the negligence of both plaintiff and defendant, concurrently contributing to the injury, then your verdict must be for the defendant. does not undertake to deal with relative degrees of negligence, and even though the defendant's employes were guilty of negligence, if you also find that the plaintiff's negligence contributed to the injury, then your verdict must be for the defendant, regardless of the ratio or proportion of negligence of the respective parties. Where the plaintiff himself so far contributes to the accident by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution, the accident would not have occurred, plaintiff cannot recover and your verdict must be for the defendant.

The burden is upon the plaintiff to show by a fair preponderance of the evidence that the injuries he complains of have resulted from the accident, not merely that they may have so resulted. You are not justified in awarding him for purely speculative injuries, that is to say, for results which may or may not happen, and you will allow the plaintiff nothing for future pain and suffering, unless you are satisfied by a fair preponderance of the evidence that future pain and suffering are reasonably certain to result from the injuries.

If you find for the plaintiff in this action, you

will confine your verdict to such an amount as will compensate him for actual loss and damage in the case. You will not allow anything by way of punishment or exemplary damages. There should not be any idea of punishing the defendant in your minds, but simply that of compensating the plaintiff for his loss, if as I said before, you should find from the evidence in the case that he is entitled to recover anything.

You are in this case as in every other case where questions of fact are submitted to the jury for their determination, the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility of the witnesses. In weighing the evidence and passing upon the credibility of the witnesses, you will take into consideration the demeanor of the witnesses who have appeared and testified before you, their manner in giving their testimony, whether they impress you as testifying freely, fairly, frankly and openly, just as you would expect a person to testify who was trying to tell you the whole truth, not keeping back anything, or whether on the other hand they impress you as being reluctant, hesitating, equivocating, shifting, having to be asked repeatedly questions before they divulge what they claimed to know. On the other hand, you are to take into consideration if they seem to be willing or interested in the case, volunteering testimony and statements concerning which nothing had been asked, what the law calls "swift witnesses"; you should also take into consideration the position or situation in which each witness was placed and the condition in which he was as enabling him to know exactly the things about which he undertook to tell you, seeing them or hearing them or having an opportunity to learn them. It is easy to see that one witness may either by reason of the situation he is in or by reason of the condition he is in to be much better qualified and in a better position to see just how things happened than one not so situated. You will also take into consideration the interest that any witness may have in the case, either as shown by the manner in which he gave his testimony or by his relation to the case. This would apply to all of the witnesses in the case, experts and the plaintiff himself, who, together with his wife, have taken the stand and testified in his behalf. You would apply to his testimony and hers the same tests you do to the testimony of other witnesses including the interest they must feel in the result of the case. If you conclude that the defendant's servants who were in charge of the car may have had an interest by reason of their relation to this accident in the case, you should give weight to that in passing upon their credibility.

I believe it was twenty-six years that was shown by the mortality tables as being the expectancy of life of a man forty-two years old, which the plaintiff testified he was. You understand that these tables were admitted and that evidence was admitted simply as circumstances. The life insurance companies of the world have, over a series of years, col-

lected statistics regarding the length of human life and the length of a man's expectancy at different ages, and this is admitted simply as a circumstance showing that the average age of such men as were the subject of those tables, when they reached fortytwo years old, might be reasonably expected to live twenty-six years more. You will take that into consideration in connection with all that the evidence has shown concerning the plaintiff in the case, if you reach that stage in your deliverations. You can understand that the appearance of the plaintiff—if he was an unusually robust, strong man, you might conclude that he would live more than twenty-six years: that if he did not have the usual health of ordinary men, you might conclude that he would live less, in spite of these tables.

The Court will submit to you two forms of verdict, one finding for the plaintiff and one finding for the defendant. If you should find for the plaintiff,—you have been in other cases and know it would be your duty to, before returning the verdict in favor of the plaintiff into Court, to fill in the amount of his recovery in the blank which the Court submits to you. When you arrive at a verdict, you will cause it to be signed by the foreman and inform the Bailiff that you have agreed and return it into Court.

Thereupon the jury retired and thereafter returned with their verdict in favor of defendant.
UNITED STATES OF AMERICA,

Western District of Washington.

Now on this 9th day of MARCH, 1914, this cause

having come on regularly before the Court upon the application of plaintiff for the settling and certifying of his proposed bill of exceptions lately filed herein, and the time for such settling and certifying of said bill of exceptions having been duly extended by orders of the Court and by the stipulations of the parties until and including this day, and the several amendments thereto proposed by defendant having been incorporated and embodied in said proposed bill of exceptions pursuant to the stipulation of the parties and order of the court on file; and said proposed bill of exceptions having been written anew and filed with the clerk pursuant to such stipulation and order; and, it appearing that said bill of exceptions as written anew as aforesaid contains so much of the evidence as is necessary for consideration of the exceptions taken by plaintiff and allowed by the court at the trial, except the certain exhibits introduced in evidence by the defendant and marked respectively Defendant's Exhibits "A", "B", "C", and "G", which exhibits are hereby made part of said bill of exceptions, and the clerk is hereby directed to attach the same thereto as part thereof.

Now, therefore, on motion of the said attorneys for plaintiff, it is further ordered that said proposed bill of exceptions as written anew and filed in the cause as the same now stands amended as aforesaid, with the exhibits aforesaid attached thereto, be and it hereby is settled as the true bill of exceptions in this cause, and that the same as so settled be now and here settled accordingly by the undersigned, the

Judge of this Court, who presided at the trial of this cause, and that said bill of exceptions, when so certified, be filed by the clerk.

EDWARD E. CUSHMAN,

Judge.

"FILED in the U. S. District Court, Western District of Washington, Southern Division, MAR 9, 1914.

FRANK L. CROSBY, Clerk. By E. C. Ellington, Deputy."

CASE NO. 1262.
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON.
HENRY

VS.

T. R. & P. CO.

DEFENDANT'S EXHIBIT "B."

CARSTENS & EARLES, Inc.
INVESTMENT BANKERS
LOWMAN BUILDING
Seattle, U. S. A.

11th. April, 1911.

"Puget Sound Electric Railway
Tacoma Railway & Power Co.
RECEIVED
APR. 12, 1911.
MANAGER'S OFFICE.
Tacoma, Wash."

Supt. Bean,

Tacoma Ry. and Power Co., Tacoma, Washington.

Dear Sir:

Permit me to utter a vigorous protest against the carelessness of your employes in the matter of starting a car before a passenger is fully aboard.

Last Thursday, the 6th inst., the writer was entering car 115 which was in charge of conductor 259, and with one hand grasped the rail or bar, in the act of entering, when, without warning, the car started. As a result I was nearly thrown under the car, and was much bruised, and suffered a severed strain in the arm and back, besides the shock which unnerved me. I voiced my protest to the conductor in the presence of witnesses, but he did not care enough to make a record of the matter. He seemed to have no interest in the matter other than forgetting to collect the fare which is herewith inclosed in the form of postage.

Once before one of your cars did the same thing and I made no complaint. This time I shall endeavor to make such an impression as to preclude the possibility of a recurrence of such carelessness.

I have been loathe to act in the matter. However, I do not care to quietly submit to such physical suffering without protest, and have placed the matter in the hands of A. M. Arntson, an attorney in Tacoma.

Very truly yours,
M. G. HENRY.

"FILED in the U. S. DISTRICT COURT for the Western District of Washington, Southern Division, October 28, 1913.

FRANK L. CROSBY, Clerk. By E. C. Ellington, Deputy."

CASE NO. 1262.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON.
M. G. HENRY,

VS.

TACOMA RAILWAY & POWER COMPANY.

DEFENDANT'S EXHIBIT "G."

THIS AGREEMENT, made this 24th day of March, 1911, between TACOMA RAILWAY & POWER COMPANY, a New Jersey Corporation, hereinafter called "Employer," party of the first part, and J. W. Roberts of Tacoma, Washington, hereinafter called "Employe," party of the second part, WITNESSETH:

That in consideration of the Employer furnishing employment to the Employe as a conductor—motorman—upon its street railway lines, the Employe agrees as follows, to-wit:

I.

That he will perform said service as conductor—motorman—faithfully and to the best of his ability, exercising his best care and judgment to avoid accidents.

II.

That he will reimburse the Employer for all dam-

ages or injuries to or caused by, the street car he is operating, wherein said damage or injury is due to the negligence of the Employe and in the event that said damage or injury arises from the concurring negligence of one or more other employes, then this Employe agrees to raimburse the Employer his proportionate share of the same.

#### III.

The Employer, by its Superintendent, shall be the sole judge of the extent of the damage or injury done, and shall also whose fault or negligence produced the same, and what the Employe's proportionate share shall be in cases of the concurring negligence of several employes.

#### IV.

IN WITNESS WHEREOF the Employer has caused this agreement to be executed by its officer

thereunto duly authorized, and said Employer has affixed his signature, the day and year first above written.

TACOMA RAILWAY & POWER COMPANY By J. W. ROBERTS.

Witnesses:

GEORGE HENDRY.

"FILED in the U. S. District Court, Western District of Washington, Southern Division. OCT. 31, 1913.

FRANK L. CROSBY, Clerk. By E. C. Ellington, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

No. 1262

VS.

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

# Assignment of Errors

Comes now the plaintiff, M. G. Henry, and files the following Assignment of Errors upon which he well rely upon his prosecution of his Writ of Error in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause:

I.

That the Honorable District Court of the United States, Western District of Washington, Southern Division, erred in rejecting the testimony of said plaintiff that, in consequence of the injury of which he complains in this action, while walking upon the public streets, he would slide or shoot toward people, who would stick out their elbows and dig him in the side, and that, several times, "miserable whelps" had actually struck him hard.

II.

That said District Court erred in refusing to per-

mit the witness OWEN A. ROWE to answer the following questions, viz:

"Will you state whether, in your opinion, prior to this accident, Mr. Henry was a good bond buyer?"

#### III.

That said District Court erred in excluding the testimony offered to be given by the witness OWEN A. ROWE to the effect that the plaintiff was a thoroughly competent bond man up to the time of the accident, and that he was very successful in the handling of large issues of bonds, running into hundreds of thousands of dollars.

### IV.

That said District Court erred in refusing to permit the witness Mrs. M. G. HENRY to testify concerning what was said to her by plaintiff in the evening following the accident on his arrival home in Seattle, concerning the cause of his condition at that time.

## V.

That said District Court erred in refusing to permit the witness H. P. PRATT to answer the following question, viz:

"Is that interest to continue?"

## VI.

That said District Court erred in refusing to permit the witness H. P. PRATT to answer the following question, viz:

"State whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?"

### VII.

That said District Court erred in rejecting the testimony of the witness H. P. PRATT, offered by plaintiff, that, "by reason of plaintiff's condition—his inability to do business and to travel about as demanded by the business" of the firm of which plaintiff and the witness were members, "matters have progressed to a point where they," the other members of the firm, "have had to carry Mr. Henry for some time, more as an act of charity than otherwise, and that the end has come, or will come within a short time, when he must sever his connection with" the business of the firm, as bearing upon the measure of damages resulting from said injuries.

#### VIII.

That said District Court erred in instructing the jury in the course of the trial, in connection with the matters referred to in Assignment of Error No. VII, above, as follows, viz:

"There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carried others around for pleasure excursions, himself. Counsel must be careful and not be continually fluttering around the border line of what is objectionable, in trying to get it in one way or another."

## IX.

That said District Court erred in instructing the jury in the course of the trial, in connection with the matters referred to in Assignment of Error Nos.

VII and VIII, above set forth, as follows, viz:

"The remarks of the court are in a sense provoked by the counsel. The remarks of the court would not ordinarily be justified, as you are the sole and exclusive judges of the facts in every case from the evidence. Counsel, by this offer, which he had no business to make in the form that he did—the court felt it required some reprimand to call his attention to the fact, so that he would not repeat it; and, therefore, the remark was made."

## X.

That said District Court erred in refusing to permit the witness MARTIN MATHIESON to answer the following question, viz:

"I show you defendant's Exhibit G, being a form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?"

## XI.

That said District Court erred in rejecting the plaintiff's offer to prove by the witness ALBERT OLSON that he had also signed the form of agreement contained in defendant's Exhibit G, and referred to in the foregoing Assignment of Error No. X.

## XII.

That said District Court erred in denying the plaintiff's petition for a new trial for the following cause materially affecting his substantial rights in said action, viz: Errors in law occurring at the trial, and duly excepted to, as specified in the foregoing Assignment of Error Nos. I, II, III, IV, V. VI,

VII, VIII, IX, X and XI, and each of them.

Wherefore, the said plaintiff and plaintiff in error prays that the judgment of the Honorable District Court of the United States, Western District of Washington, Southern Division, be reversed, and such directions be given that full force and efficacy may inure to plaintiff by reason of the cause of action set up in his complaint filed in the cause.

ANTHONY M. ARNTSON,

and

T. W. HAMMOND,

Attorneys for Plaintiff and Plaintiff in Error.

Filed in the U. S. District Court Western District of Washington, Southern Division, July 17, 1914.

FRANK L. CROSBY, Clerk. By F. M. Harshberger, Deputy.

Service of the above and foregoing Assignment of Errors is hereby acknowledged by receipt of a copy thereof this 17th day of July, 1914.

JNO. A. SHACKLEFORD,
Attorneys for Defendant.

"FILED in the U. S. District Court for the Western District of Washington, Southern Division, July 17, 1914.

FRANK L. CROSBY, Clerk. By F. M. Harshberger, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY.

VS.

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant

# Petition for Writ of Error

The plaintiff, M. G. Henry, feeling himself aggrieved by the verdict of the jury and the judgment entered thereon, in the above entitled cause, comes now by Anthony M. Arntson and T. W. Hammond, his attorneys, and complains that in the record and proceedings had in said cause, and in the rendition of said judgment in said District Court of the United States, for the Western District of Washington, Southern Division, manifest error hath happened to the great damage of said plaintiff, and petitions this Honorable Court for an order allowing said plaintiff to prosecute a Writ of Error to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said Writ of Error, and that the judgment heretofore entered herein be superseded and stayed pending the determination of

said cause in the said Circuit Court of Appeals. And your petitioner will ever pray.

ANTHONY M. ARNTSON

and

T. W. HAMMOND,

Attorneys for Plaintiff.

Service of the within and foregoing Petition for Writ of Error is hereby acknowledged by receipt of a copy thereof this 17th day of July, 1914.

JNO. A. SHACKLEFORD, Attorneys for Defendant.

"Filed in the U. S. District Court for the Western District of Washington,
Southern Division, July 17, 1914.
FRANK L. CROSBY Clerk.
By F. M. Harshberger, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

VS.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

# Order Allowing Writ of Error

Upon motion of Anthony M. Arntson and T. W. Hammond, attorneys for the above named plaintiff, and upon filing a petition for a Writ of Error and an Assignment of Errors, it is

ORDERED that a Writ of Error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said Writ of Error be and hereby is fixed at \$500.00, to be given by said plaintiff, and that on the giving of said bond said judgment heretofore rendered shall be superseded pending the determination of said cause in said Circuit Court of Appeals.

In witness whereof the above order is granted and allowed this 17th day of July, 1914.

(Sig.) EDWARD E. CUSHMAN,

Judge.

#### FILED

IN THE U.S. DISTRICT COURT

Western Dist. of Washington Southern Division

Jul 17 1914

FRANK L. CROSBY, Clerk By F. M. HARSHBERGER, Deputy

Service of the foregoing Order Allowing Writ of Error is hereby acknowledged by receipt of a copy thereof this 17th day of July, 1914.

JNO. A. SHACKLEFORD, Attorneys for Defendant.

"FILED in the U. S. District Court for the Western District of Washington, Southern Division, July 17, 1914.
FRANK L. CROSBY, Clerk.
By F. M. Harshberger, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

VS.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

#### Bond on Writ of Error

KNOW ALL MEN BY THESE PRESENTS: That we, M. G. Henry, as principal, and Maryland Casualty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the Tacoma Railway & Power Company, a corporation, the defendant in the above entitled action, in the sum of Five Hundred and no Dollars (\$500.00), for which sum well and truly to be paid to the said Tacoma Railway & Power Company, a corporation, its successors and assigns, we bind ourselves and our executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of July, A. D. 1914.

The condition of this obligation is such that whereas the above named plaintiff, M. G. Henry,

has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above entitled cause by the District Court of the United States for the Western District of Washington, Southern Division, and whereas the said M. G. Henry desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said United States Circuit Court of Appeals for the Ninth Circuit;

Now, therefore, the condition of this obligation is such, that if the above named M. G. Henry shall prosecute said Writ of Error to effect and answer all costs and damages awarded against him if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Seal)

M. G. HENRY.

MARYLAND CASUALTY COMPANY. By GEO. W. FOWLER,

Agent.

Countersigned by R. S. HOLT,

Its Attorney in Fact.

Approved this 18th day of July, A. D. 1914. (Signed) EDWARD E. CUSHMAN,

Judge.

Service of the foregoing Bond on Writ of Error by receipt of a copy thereof is hereby acknowledged on this 17th day of July, 1914.

JNO. A. SHACKLEFORD, Attorney for Defendant. "FILED in the U. S. District Court for the Western District of Washington, Southern Division, July 18, 1914.
FRANK L. CROSBY, Clerk.
By F. M. HARSHBERGER, Deputy."

United States District Court of Appeals, for the Ninth Circuit.

M. G. HENRY, Plaintiff in Error,

VS.

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant in Error.

#### Writ of Error

UNITED STATES OF AMERICA,

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between M. G. Henry, plaintiff in error, and Tacoma Railway & Power Company, a corporation, defendant in error, a manifest error hath happened,

to the great damage of the said M. G. Henry, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, in said Circuit, on thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 17th day of July, A. D. 1914.

(Seal of the United States District Court,

Western District of Washington.)

(Signed) FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington, Southern Division.

By E. C. Ellington, Deputy Clerk, U. S. District Court, Western District of Washington.

Allowed by:

Service of the within Writ of Error and receipt of a copy thereof is hereby admitted this 17th day of July, 1914.

#### JOHN A. SHACKLEFORD

Attorneys for Defendant in Error.

"FILED in the U. S. District Court, Western District of Washington, Southern Division, JUL 17, 1914.

FRANK L. CROSBY, Clerk. By F. M. HARSHBERGER, Deputy."

#### Citation

THE UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, to Tacoma Railway & Power Company, (a corporation), Defendant in Error, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the court room of said Court, in the City of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to Writ of Error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein M. G. Henry is plaintiff in error and you, the said Tacoma Railway & Power Company, are defendant in error, to show cause, if any there be, why the judgment in

the said Writ of Error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 17th day of July, A. D. 1914. (Seal of the United States District Court,

Western District of Washington.)

(Signed) EDWARD E. CUSHMAN,
Judge of the United States District Court
for the Western District of Washington,
Southern Division.

Service of the above and foregoing Citation is hereby acknowledged this 17th day of July, A. D. 1914.

JNO. A. SHACKLEFORD, Attorneys for Defendant in Error.

"FILED in the U. S. District Court Western District of Washington, Southern Division, JUL 17, 1914. FRANK L. CROSBY, Clerk. By F. M. HARSHBERGER, Deputy."

#### Clerk's Certificate

UNITED STATES OF AMERICA, WESTERN

SS.

DISTRICT OF WASHINGTON.

I, FRANK L. CROSBY, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the above entitled cause as the same remains of record and on file in my office, in said District, at Tacoma, and that the same constitutes the return on the annexed Writ of Error.

I further certify that I attach hereto and herewith transmit the original Writ of Error and original Citation, together with original exhibits: Defendant's "A" (photo) and Defendant's "C" (Blue Print).

I further certify that the following is a full, true and correct statement of all expenses, costs and fees, and charges incurred and paid in my office by or on behalf of the Plaintiffs in Error for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fees (Sec. 828 R. S. U. S., as Amended by Sec. 6, Act of March 2, 1905) for making record, certificate or return, 334 folios @ 30c.....\$100.20

Certificate of Clerk to transcript of rec-

ord and original exhibits, 3 folios	
@ 30c	.90
Seal to said certificate	.40
Statement of the cost of printing said	
transcript of record, collected and	
paid\$142	2.00

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Tacoma, in said District this 25th day of July, A. D. 1914.

FRANK L. CROSBY,

By F.M. Harshberger Deputy Clerk.

# In the United States Circuit Court of Appeals

For The Ninth Circuit

M. G. HENRY,

Plaintiff in Error,

VS.

TACOMA RAILWAY & POWER COM-PANY, a corporation,

Defendant in Error.

No. 2453

WRIT OF ERROR TO THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION.

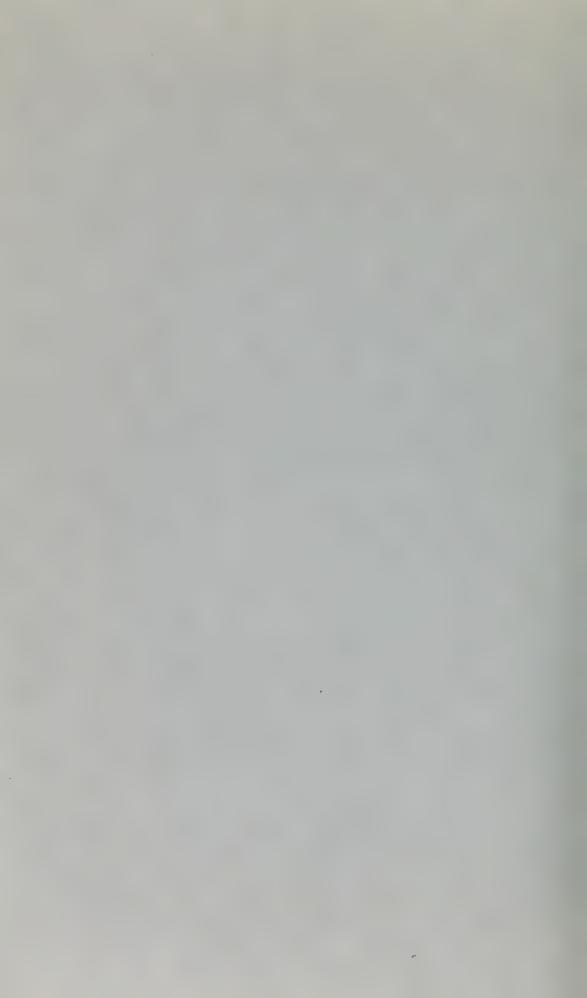
## BRIEF OF PLAINTIFF IN ERROR

ANTHONY M. ARNTSON,
T. W. HAMMOND,
Attorneys for Plaintiff in Error.

Tacoma, Washington.

Stanley Bell Ptg. Co.

P. D. Mondicion,



# In the United States Circuit Court of Appeals

For The Ninth Circuit.

M. G. HENRY,

Plaintiff in Error,
vs.

TACOMA RAILWAY & POWER COM-PANY, a corporation,

Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

### BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This is an action at law, to recover damages for personal injuries. The jury found for the defendant and plaintiff brings error.

Briefly stated, the complaint shows that defendant is a street railway company, operating cars

at Tacoma. On April 6, 1911, as plaintiff was entering one of those cars, "with one hand grasping a handhold thereon, said car was, by and through the carelessness, negligence and incompetency of defendant's servants started forward with a sudden jerk," whereby plaintiff lost his footing and was swung against the side of the car, receiving the injuries of which he complains. juries are described with some detail, and it is then alleged that by reason of them plaintiff has lost the capacity for enjoying life; that the outward manifestations of his affliction attract the attention of the curious, make him an object of pity and ridicule, and subject him to humiliation, vexation and annoyance; and that he must continue so to suffer during the remainder of his life. It is further shown that at the time of the accident he was 42 years old, of robust health and strength, employed as a bond buyer at a salary of \$100 a month, with a certainty of early advancement and increase of pay; that at that time he had an intimate knowledge of the business of buying and selling bonds, mortgages and other securities, and was possessed of special skill in that business; and at that time and since, "subject to the condition of his health," he had opportunities to engage in that business as a principal, with a certainty of profits greatly in excess of the salary above named. That by reason of his injuries he was unable to perform his work as he had previously done, and in consequence lost his employment on August 1, 1911. Since that date he has

been unable to hold any position, but has attempted to assist in the conduct of a business such as above mentioned, but that by reason of his rapidly failing health, caused by his injuries, he has been and will be unable to perform the duties necessarily devolving upon him in connection therewith, and, as a result of his condition, his personal efforts are unprofitable, and it will be impossible for him during the rest of his life to perform any labor or hold any employment, or conduct any business, or earn any money for himself and family. (Transcript, pp. 4-10.)

The answer of defendant admitted the accident, but denied the damages, and alleged that the accident was due to the heedlessness and carelessness of plaintiff in attempting to board a moving car. The affirmative matter of the answer was put in issue by the reply. (Transcript, pp. 14-19.)

A verdict was rendered in favor of the defendant, and judgment of dismissal was entered. (Transcript, pp. 20-22.) A petition for new trial was thereafter filed in due time, which, after consideration by the court, was denied on January 21, 1914. (Transcript, pp. 22-37.)

At the trial plaintiff testified that he had become a physical wreck in consequence of the injuries received at the time of the accident. (Transcript, pp. 38-40.) Experts gave testimony strongly tending to prove that as a result of the accident plaintiff was suffering from "cerebellar ataxia," (Transcript, pp. 38-40.)

script, p. 77), a disease "that interfered very materially with his walking and employing himself where the muscles were called into play." (Transcript, p. 75.) Dr. SNOKE testified that "he thought plaintiff would not recover; and would expect him to get worse, and that, within a few years, he would be unable to walk at all." (Transcript, p. 78.) And Dr. JAMES, who had treated the plaintiff ever since the injury, said he "had done everything he knew to do, but the patient had grown gradually worse; and, in his opinion, the time would come when plaintiff could not walk." (Transcript, p. 79.) There was much other testimony to the same effect.

The plaintiff testified that, at the time of the accident, he was in the employ of Carstens & Earles, buying bonds; and, because of his inability to perform the work resulting from his injuries, lost his position. (Transcript, p. 39.) OWEN A. ROWE, a witness called by plaintiff, testified that he was in charge of the mortgage department of that firm at the time of the accident; that at that time plaintiff was the bond buyer, going to different towns, bargaining for improvement bonds; that he was acquainted with the ability of plaintiff in that line; and thought he knew the qualities which go to make up a "good bond man." He was then asked by—

"Mr. ARNTSON: Will you state whether, in your opinion, prior to the accident, Mr. Henry was a good bond buyer?

Mr. OAKLEY: I object to that as calling for an opinion which is a conclusion.

Mr. ARNTSON: The witness has qualified as an expert, and that he is qualified to give an opinion as to Mr. Henry's ability in that regard.

The COURT: Objection sustained. There may be instances when such evidence is competent, but it occurs to the court that there are three or four ways to arrive at this—the wages he drew, and the length of his experience, and other ways of establishing this matter, without undertaking to make it the subject of expert opinion evidence. Exception allowed.

WITNESS: The plaintiff's experience in the buying and selling of bonds while with Carstens & Earles was very extensive.

Q. State, if you know, what success he made in dealing with bonds.

Mr. OAKLEY: I object to that on the ground that it is incompetent, irrelevant and immaterial.

The COURT: Objection sustained. Any answer he would give would be indefinite. Exception allowed.

Mr. ARNTSON: We offer to prove by this witness that Mr. Henry was a thoroughly competent bond man up to the time of the accident, and that he was very successful in the handling of large issues of bonds, running into hundreds of thousands of dollars.

Mr. OAKLEY: The complainant said that he was earning \$100 a month in that business. There is no claim that he has lost a dollar by reason of being unable to perform that business. In fact, he is making more money today, or they would have shown it.

The COURT: Objection sustained. You ask a man if he was a very successful bond buyer. That might mean one thing to one man and an entirely different thing to another. It is too uncertain, in-

definite, general and misleading. Exception allowed." (Transcript, pp. 56-58.)

Four months after the accident, after losing his position with Carstens & Earles, plaintiff engaged with Mr. H. W. Pratt and another in investment banking, bonds and mortgages. (Transcript, p. 45.) In the course of the examination of Mr. ROWE on the stand, Mr. OAKLEY had made this statement in the presence of the jury,—

"There is no claim that he (plaintiff) has lost a dollar by reason of being unable to perform that business. In fact, he is making more money today, or they would have shown it. (Transcript, p. 58.)

After that, Mr. PRATT was called and testified that he had been associated with plaintiff in the investment banking business several years; that prior to the accident plaintiff was an unusually energetic man, physically and mentally; that since the accident plaintiff's health had been poor; that during the first few months of their association plaintiff accomplished "quite a little work;" that since then his efficiency had diminished; that "at present" it was small; that "the results accomplished by plaintiff are a small fraction of what he accomplished during the earlier days of his association with him; that plaintiff's greatest value to the firm was when he was able to act as an "outside man;" and that now, owing to his disability, plaintiff is valueless as an outside man; and that plaintiff's present interest in the business "is between 25

and 30%." (Transcript, pp. 66, 67.) He was then asked by—

"Mr. ARNTSON: Is that interest to continue?"

Counsel for defendant objected that "it is incompetent, irrelevant and immaterial." The objection was sustained by the court, and an exception allowed.

"Mr. ARNTSON: Please state whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?"

Defendant objected, the objection was sustained, and an exception allowed.

"Mr. ARNTSON: I offer to prove by this witness that, by reason of Mr. Henry's condition—his inability to do business and travel about as demanded by the business—matters have progressed to a point where they have had to carry Mr. Henry for some time, more as an act of charity than otherwise, and that the end has come, or will come within a short time, when he must sever his connection with this business. I offer to prove that as bearing upon the measure of damages as the result of his injury.

Mr. OAKLEY: I wish to save an exception to the remarks of counsel just made in reference to carrying the plaintiff here as a charitable act, and discontinuance with the firm, as calculated to prejudice the jury.

THE COURT: The objection is sustained, and the jury instructed to disregard the offer. There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carries others around on pleasure excursions himself. Counsel must be careful, so, if you get a ver-

dict, it will stand, and not be continually fluttering around the border line of what is objectionable, in trying to get it in (in) one shape or another. It will be more likely to result to your prejudice than to do you good."

Whereupon plaintiff prayed an exception to the ruling and to the remarks of the court, which was allowed. Thereupon, the court further instructed the jury as follows:

"The remarks of the court are in a sense provoked by counsel. The remarks of the court would not ordinarily be justified, as you are the sole and exclusive judges of the facts in every case from the evidence. Counsel by his offer, which he had no business to make, in the form that he did—The court felt it required some reprimand to call his attention to the fact, so that he would not repeat it. And, therefore, the remark was made."

Whereupon plaintiff excepted, and such exception was allowed. (Transcript, pp. 67-69.)

The defendant called the conductor and motorman (Martin Mathieson and Albert Olson) who were on the car at the time of the accident, who gave testimony tending to support the allegations of the answer relating to negligence of plaintiff contributing to his injuries. (Transcript, pp. 79, 81.) Later plaintiff called in rebuttal one ROB-ERTS, who was also employed on the car at that time as a "student conductor." On cross-examination of this witness by counsel for defendant it was shown that upon entering the employment of defendant he had been required to sign a contract

(Defendant's Exhibit G) containing, among others, the following provisions:

"That he (the employe) will reimburse the employer for all damages or injuries to or caused by the street car he is operating, wherein said damage or injury is due to the negligence of the employe, and in the event that said damage or injury arises from the concurring negligence of one or more other employes, then this employe agrees to reimburse the employer his proportionate share of the same.

\* \* The employer \* \* \* shall be the sole judge of the extent of the damages or injury done, and \* \* \* also whose fault or negligence produced the same, and what the employe's proportionate share shall be in cases of concurring negligence of several employes." (Transcript, pp. 117-118, Defendant's Exhibit G.)

Later plaintiff recalled the witness Mathieson, when the following occurred:

"MR. ARNTSON: I show you defendant's Exhibit G, being form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?

MR. OAKLEY: I object to that. It was introduced simply for impeachment purposes of Roberts. It is not in rebuttal of anything introduced.

MR. HAMMOND: It is not rebuttal, but it is the first time we knew of such a thing. It is part of our cross-examination, for the purpose of showing, if we can, that this witness has a direct, positive interest in the result of this case.

THE COURT: Objection sustained. It is not rebuttal.

MR. HAMMOND: I don't think it is properly rebuttal; but I ask the privilege of calling the witness for further cross-examination in order to show

this. This is the first time it has come to our knowledge that the employes of defendant were bound in this way. It seems to me material, if we can, to show that this witness is bound, so far as the law can do it, to make good to the defendant any verdict that might be rendered in this case.

THE COURT: The motion is denied.

Whereupon plaintiff prayed an exception to the ruling, and the exception was allowed.

MR. HAMMOND: I will ask the same privilege as to the witness Olson, and ask leave to prove by him that he signed a similar contract.

THE COURT: Assuming that the same objection will be made?

MR. HAMMOND: Yes.

THE COURT: Objection sustained, motion denied, and exception allowed." (Transcript, pp. 90-91.)

#### SPECIFICATIONS OF ERROR.

I.

The court erred in refusing to permit the witness OWEN A. ROWE to answer the following question, viz.:

"Will you state whether, in your opinion, prior to this accident, Mr. Henry was a good bond buyer?" (Transcript, p. 57; Assignment II.)

#### II.

The court erred in excluding the testimony offered to be given by the witness OWEN A. ROWE to the effect that the plaintiff was a thoroughly competent bond man up to the time of the accident, and that he was very successful in the handling of large issues of bonds, running into hundreds of thousands of dollars. (Transcript, p. 58; Assignment III.)

#### III.

The court erred in refusing to permit the witness H. P. PRATT to answer the following question, viz.:

"Is that interest to continue?" (Transcript, p. 67; Assignment V.)

#### IV.

The court erred in refusing to permit the witness, H. P. PRATT, to answer the following question, viz:

"State whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?" (Transcript, p. 67; Assignment VI.)

#### V.

The court erred in rejecting the testimony of the witness H. P. PRATT, offered by plaintiff, that, "by reason of plaintiff's condition—his inability to do business and to travel about as demanded by the business" of the firm of which plaintiff and the witness were members, "matters have progressed to a point where they," the other members of the firm, "have had to carry Mr. Henry for some time, more as an act of charity than otherwise, and that the end has come, or will come within a short time,

when he must sever his connection with" the business of the firm, as bearing upon the measure of damages resulting from said injuries. (Transcript, pp. 67, 68; Assignment VII.)

#### VI.

The court erred in instructing the jury in the course of the trial, in connection with the matters referred to in Specification No. V, above, as follows, viz.:

"There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carried others around for pleasure excursions, himself. Counsel must be careful and not be continually fluttering around the border line of what is objectionable, in trying to get it in in one way or another." (Transcript, p. 68; Assignment VIII.)

#### VII.

The court erred in instructing the jury in the course of the trial, in connection with the matters referred to in Specifications Nos. V and VI, above set forth, as follows, viz.:

"The remarks of the court are in a sense provoked by the counsel. The remarks of the court would not ordinarily be justified, as you are the sole and exclusive judges of the facts in every case from the evidence. Counsel, by this offer, which he had no business to make in the form that he did—the court felt it required some reprimand to call his attention to the fact, so that he would not repeat it; and, therefore, the remark was made." (Transcript, p. 69; Assignment IX.)

#### VIII.

The court erred in refusing to permit the witness MARTIN MATHIESON to answer the following question, viz.:

"I show you defendant's Exhibit G, being a form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?" (Transcript, p. 90; Assignment X.)

#### IX.

The court erred in rejecting the plaintiff's offer to prove by the witness ALBERT OLSON that he had also signed the form of agreement contained in defendant's Exhibit G, and referred to in the foregoing Specification No. VIII. (Transcript, p. 91; Assignment XI.)

#### X.

The court erred in denying the plaintiff's petition for a new trial for the following causes materially affecting his substantial rights in said action, viz.: Errors in law occurring at the trial, and duly excepted to, as specified in the foregoing Specifications Nos. I, II, III, IV, V, VI, VII and VII, and each of them. (Transcript, pp. 23-26-36; Assignment XII.

#### ARGUMENT.

Specifications I., II. and X (Assignments of Error II., III. and XII.) are submitted without written argument.

#### III.

The court erred in refusing to permit the witness H. P. PRATT to answer the following question, viz.: "Is that interest to continue?" (See Transcript, p. 67; Assignment V.) This specification will be considered with the two following.

#### IV.

The court erred in refusing to permit said witness, H. P. PRATT, to answer the following question, towit:

"State whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?" (See Transcript, p. 67; Assignment VI.)

This specification will be discussed together with the following.

#### V.

The court erred in rejecting the offer of plaintiff to show that, in consequence of his injuries, he was about to lose his position in the firm of which he was a member. (See Transcript, pp. 121, 122; Assignment VII.)

At the time of the accident plaintiff was employed as a bond buyer at a salary of \$100 a month,

and, by reason of his injuries, lost that position soon after. (Transcript, p. 39) Later, he became associated with Mr. H. P. Pratt in an investment business. (Transcript, pp. 45, 66) At the trial, counsel for defendant asserted in the presence of the jury that plaintiff was making more money "to-day" than \$100 per month, "or they would have shown it." (Transcript, p. 58)

Later, Mr. Pratt was called, and testified that during the first few months of their association in business, plaintiff accomplished "quite a little work;" that since then his efficiency had diminished; that, at the time of the trial, the results accomplished by plaintiff were but a small fraction of what they had been at first; that his value to the firm was chiefly as an outside man; and that, owing to his disability, plaintiff was no longer valuable as such. (Transcript, pp. 66, 67) The witness was then asked whether plaintiff's interest in the business was to continue (Transcript, p. 67), as bearing not only upon the injury to his ability as a business man, as alleged in the complaint, but also the injury to his ability to earn any salary, as well as to refute the assertion of defendant's counsel above referred to. Upon objection of the defendant, the witness was not permitted to answer. Thereupon counsel, believing that the objection was to the form of the question, in that it was considered too broad, made the question more specific by asking the following question:

"State whether or not Mr. Henry's physical condition is to result in a change in his connection with

the firm?" (Transcript, p. 67) Counsel for defendant again objecting, the court sustained the objection, upon the ground, as stated, that the question was speculative. (Transcript, p. 67) Thereupon counsel for the plaintiff, still feeling that he might not have made his position clear to the court, by bringing it within the issues of the pleadings, in view of the former discussion upon the subject, made the following offer:

"I offer to prove by this witness that, by reason of Mr. Henry's condition—his inability to do business and travel about as demanded by the business—matters have progressed to a point where they have had to carry Mr. Henry for some time more as an act of charity than otherwise, and that the end has come, or will come shortly, when he must sever his connection with that business. I offer to prove that as bearing upon the measure of damages as the result of the injury." (Transcript, pp. 67, 68)

Defendant objected to the offer, whereupon the court said:

"The objection is sustained and the jury instructed to disregard the offer. There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carries others around on pleasure excursions himself. Counsel must be careful, so, if you get a verdict, it will stand, and not be continually fluttering around the border line of what is objectionable, in trying to get it in in one shape or another. It will be more likely to result to your prejudice than to do you good." (Transcript, p. 68)

We submit this ruling was erroneous, and the remarks of the court of a character to prejudice plain-

tiff's case. The remarks of the court are made the subject of the following specifications.

It was alleged in the complaint and put in issue by the answer that, since August 1, 1911, plaintiff had been unable to hold any position; that he had attempted to assist in the conduct of an investment business, but, by reason of his "rapidly failing health caused by said injuries," he has been and will be unable to perform the duties necessarily devolving upon him in connection with such business; and that, as a result, his personal efforts are unprofitable, and that it would be impossible, during the balance of his lifetime, for him to conduct any business or earn any money. More than this, as already shown, counsel for defendant had aggressively asserted before the jury that, at the time the offer was made, plaintiff was making more money than he had made before the accident. Clearly, under such circumstances, plaintiff was entitled to prove the facts offered by him. If it were true that his associates were carrying him as an act of charity, in consequence of his injuries, and the time had come, or was about to arrive, when they would do so no longer, and he must leave the firm in which defendant was insisting he was earning more than \$100 a month, common fairness required that he be permitted to show it. The result offered to be proven was the natural consequence of the injuries inflicted which defendant was bound to anticipate.

Nor were the objections stated by the court sufficient to justify the ruling. The court seems to have thought something had been assumed by the offer, whereas nothing was assumed. The offer was to prove the fact that plaintiff was being carried as an act of charity, and was about to lose his position in the firm; in other words, that his usefulness was at an end, and his earning power destroyed.

The declaration of the court that the evidence so far had shown that plaintiff was himself performing acts of charity, rather than that charity was being done to him, was uncalled for and highly prejudicial to plaintiff. If it were true that plaintiff had carried others on pleasure excursions, such fact would have no tendency to negative the facts offered to be proven, while the subsequent remarks of the court could serve no purpose other than to place counsel for plaintiff in an undesirable light before the jury. See—

Peterson v. Pittsburg, etc., Min. Co., 140 Pac. Rep., 519.

#### VI. and VII.

The court erred in its remarks and instructions to the jury, as set forth in Specifications VI. and VII. (See Transcript, pp. 122, 123; Assignments of Error VIII. and IX.)

The subject matter of these specifications, and specification V., just discussed, are closely related, and all three might well have been considered together.

Following the remarks of the court quoted when considering Specification V., to-wit:

"There is nothing in this case to warrant the as-

sumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carries others around on pleasure excursions himself. Counsel must be careful, so, if you get a verdict, it will stand, and not be continually fluttering around the border line of what is objectionable, in trying to get it in in one shape or another. It will be more likely to result to your prejudice than to do you good." (Transcript, p 68) An exception having been taken to those remarks, the court continued:

"The remarks of the court are in a sense provoked by the counsel. The remarks of the court would not ordinarily be justified . . . Counsel, by his offer, which he had no business to make in the form that he did—the court felt it required some reprimand to call his attention to the fact, so that he would not repeat it. And therefore the remark was made." (Transcript, p. 69)

Even though the offered testimony be held inadmissible, as we believe it will not, we submit the remarks of the court in ruling upon the original offer and explaining those remarks were well calculated to prejudice plaintiff's case and prevent that fair trial of which all should be assured.

Briefly, the jury were told that counsel for plaintiff were shysters, who were continually trying to get before them improper testimony; that the offer just made constituted another attempt to get before them testimony to which plaintiff was not entitled; that counsel "had no business" to make the offer as they had made it, and that the court had deemed it necessary to administer a rebuke in order to put a stop to

such practices. And the language used might well be taken by the jury as an expression of doubt upon the part of the court that the plaintiff should recover a verdict. We believe this court will find nothing in the record to justify the idea that counsel for plaintiff acted in bad faith at any time during the trial. It was their duty to present to the jury every fact which, in their judgment, would tend to support plaintiff's case, and properly within the issues; and, in making the offer which called forth the rebuke of which complaint is here made, they believed and still believe they were acting in discharge of that duty. The questions previously asked of the witness did not suggest fully the answer expected; and, if plaintiff were to avail himself of his exception to the rulings of the court, it was necessary that he disclose precisely what he expected to prove.

1 Thompson on Trials, sec 678;

Pueblo v. Bradley, 128 Pac. Rep., 888;

Wright v. Chelsea, 93 N. E. Rep., 840;

Forquer v. North, 112 Pac. Rep., 439.

Hence, since counsel expected to prove what he had offered, it was proper to make the offer in the form it was made. But, whether we are correct in this or not, the remarks of the court were of such character and made under such circumstances as was likely to destroy the legitimate influence of counsel with the jury, and prejudice the cause of plaintiff.

As said in a recent case:

"While it is true that not every remark of the trial

court will constitute reversible error, where it is made with reference to the admissibility of evidence, vet there is nothing of which a nisi prius judge should be more careful than in his remarks or assertions made with reference to admitted or rejected testimony during the course of the trial. The average juror is a layman; the average layman looks with most profound respect to the presiding judge; and the jury is, as a rule, alert to any remark that will indicate favor or disfavor on the part of the judge. Human opinion is ofttimes formed upon circumstances meager and insignificant in their outward appearance; and the words and utterances of a trial judge, sitting with a jury in attendance, is liable, however well intentioned, to mould the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby."

Peterson v. Pittsburg, etc., Min. Co., 140 Pac. Rep., 521 (opin)

Or, as said in an earlier case:

"It is possible for a judge to deprive a party of a fair trial, without intending it, by his manner of trying the case; and, when it is apparent that a fair trial has not been had, the court of review should give relief for that cause as for any other."

Wheeler v. Wallace, 19 N. W. Rep., 33.

While the law on this subject is more fully stated in *Dalas C. Elec St. Ry. Co. v. McAllister*, 90 S. W. Rep., 936 (opinion)—

"An attorney at law is an officer of the court, and as such is under special obligation to be \* \* respectful in his conduct \* \* to the court or judge. He is also as such officer entitled to such treatment from the trial judge that the interest of his client will not be prejudiced. \* \* It must be conceded that

the standing and reputation of counsel for fairness and honorable conduct and his real or apparent standing with the court has great weight with the jury in determining the importance to be attached to the evidence introduced by such attorney, as well as his argument in discussing such evidence. jury be of the opinion that counsel is a man who would resort to questionable and dishonorable methods to gain an advantage, they would naturally expect the same conduct in the presentation of the evidence and in the argument of the case. As stated \* \* in McDuff v. Detroit Evening Journal, 47 N. W. Rep., 671, 'Appellate courts must presume that one occupying so important a position as that of circuit judge can influence a jury. Whenever he expresses an opinion on any disputed fact, or uses any language which tends to bring an attorney into contempt before the jury, he commits an error of law, for which the verdict and judgment must be promptly set aside."

#### And to the same effect, see:

Cronkhite v. Dickerson, 16 N. W. Rep., 371; Williams v. West Bay City, 78 N.W. Rep., 371; McIntosh v. McIntosh, 44 N. W. Rep., 593. Nave v. McGrane, 113 Pac. Rep., 88; Monier v. Phil. Rapid Trans. Co., 75 At. Rep., 1070.

When the court said to this jury that counsel for plaintiff had been "continually fluttering" about in efforts to get objectionable testimony before them; that they "had no business" to make the offer they had made; and that it had become necessary to reprimand counsel in order to put an end to such improper practices, clearly he used language tending to

bring counsel into contempt before that jury, and well calculated to bring about the verdict rendered in the case.

#### VIII. and IX.

The court erred in refusing to permit plaintiff to recall the witnesses Mathieson and Olson for further cross-examination for the purpose of showing their interest in the result of the action. (See Transcript, p. 123; Assignments X. and XI.)

It had been shown that the defendant's car, at the time of the accident, was in charge of the witnesses Mathieson, conductor; Olson, motorman, and one Roberts, "student conductor." The conductor and motorman were called and gave testimony on behalf of defendant, tending to support its claim that plaintiff had been injured while attempting to board a moving car. (Transcript, pp. 79, 81) Later, plaintiff called the student conductor in rebuttal. Crossexamined by counsel for defendant this witness admitted that he had signed defendant's Exhibit G preliminary to entering upon his employment with defendant. This contract contained, among other things, the following provisions:

"That the employe will reimburse the employer for all damages or injuries to or caused by the street car he is operating, wherein said damages or injury is due to the negligence of the employe, and in the event said damage or injury arises from the concurring negligence of one or more other employes, then this employe agrees to reimburse his employer his proportionate share of the same. \* \* The employer shall be the sole judge of the extent of the

damages and injury done, and \* \* also whose fault or negligence produced the same, and what the employe's proportionate share shall be in case of concurring negligence of several employes.' (Transcript, pp. 117-118).

After that, plaintiff recalled the witness Mathieson, whereupon the following occurred:

Mr. ARNTSON: I show you defendants Exhibit G, being the form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?

Mr. OAKLEY: I object to that. It was introduced simply for impeachment purposes of Roberts. It is not rebuttal to anything introduced.

Mr. HAMMOND: It is not rebuttal, but it is the first time we knew of such a thing. It is part of our cross-examination, for the purpose of showing, if we can, that this witness has a direct, positive interest in the result of this case.

The COURT: The objection is sustained. It is not rebuttal.

Mr. HAMMOND: I don't think it is properly rebuttal; but I ask the privilege of calling the witness for further cross-examination in order to show this. This is the first time it has come to our knowledge that the employes of defendant were bound in this way. It seems to me material, if we can, to show that this witness is bound, so far as the law can do it, to make good to the defendant any verdict that might be rendered in this case.

The COURT: The motion is denied.

Whereupon an exception to the ruling was allowed plaintiff.

Mr. HAMMOND: I will ask the same privilege as to the witness Olson, and ask leave to prove by him that he signed a similar contract.

The COURT: Assuming that the same objection will be made?

Mr. HAMMOND: Yes.

The COURT: Objection sustained, motion denied, and exception allowed. (Transcript, pp. 90-91)

We contend that the court did not, in this instance, exercise that degree of judicial discretion and fairness required by law. The plaintiff was not bound to know the contents of secret contracts between the defendant and its employes, such as are shown in the Exhibit G, and, in fact, did not know that any such contract had been signed by any of the witnesses until just before the privilege of recalling them for cross-examination was asked by him; hence, no diligence reasonably to be expected of counsel could have enabled them to present the testimony sought sooner than was done. We submit, common fairness demanded that the privilege asked should have been granted; and the ruling complained of was error highly prejudicial to plaintiff's case.

See: Thompson on Trials, sec. 348.

We submit that under the circumstances here disclosed there could be and was no fair trial, and the judgment below should be reversed and a new trial granted.

ANTHONY M. ARNTSON, T. W. HAMMOND,

Attorneys for Plaintiff in Error.

T. W. HAMMOND, Tacoma, Washington. on the brief.



# In the United States Circuit Court of Appeals

For The Ninth Circuit

M. G. HENRY,

Plaintiff in Error,

VS.

No. 2453

TACOMA RAILWAY & POWER COM-PANY, a corporation,

Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION.

### BRIEF OF DEFENDANT IN ERROR

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### BRIEF OF DEFENDANT IN ERROR

ARGUMENT.

SPECIFICATIONS I, II AND IX.

Plaintiff in error has submitted without argument his specifications of error number I, II, and IX, and we will therefore not refer to them, except to suggest to the court that these questions were di-

rected only to the amount of damages, if any, sustained by the plaintiff. The verdict for the defendant exonerated it from liability and precluded all inquiry into the question of damages. If any error was committed, and we contend that the court did not err in its ruling, this was rendered immaterial and of no prejudice to the plaintiff by the verdict.

#### SPECIFICATIONS IV AND V.

These specifications of error are subject to the same criticism as stated in reference to specifications I and II. The only probative value they possessed was directed to the question of the amounts of damages. Counsel for plaintiff making his offer of proof on these very questions stated,—

"I offered to prove that as bearing upon the measure of damages." Trans., p. 68.

Plaintiff has confused his argument under these assignments by attempting to argue his assignments VI and VII. We, therefore, refrain from arguing assignments VI and VII, under these specifications.

#### SPECIFICATIONS VI AND VII.

Under these specifications plaintiff complains of the remarks of the trial judge in ruling upon an offer of what counsel for plaintiff expected to prove by one of his witnesses. The part of the offer to which the exception was taken was as follows:

"Matters have progressed to a point where they have had to carry Mr. Henry for some time,—more as an act of charity than otherwise." The attempt of the counsel to inject into the case any reference to plaintiff's financial condition was objectionable and the court acted clearly within its discretion and performed its duty when it attempted to reprimand counsel for the offer. The court said that counsel had no business to make the offer in the form that he did, and we believe this court will agree with the trial judge in that matter.

Plaintiff further complains of the statement:

"There was nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far it has been shown that he carries others around on pleasure excursions himself."

There was, as the court correctly states, no evidence which would even justify counsel for plaintiff to state in the presence of the jury that the plaintiff was being carried as an act of charity by the corporation in which he was a substantial stockholder. He testified that he was the owner of a motorcycle, and a launch which he operated on Lake Washington; that after he became a member of the bonding corporation of Tacoma he bought an automobile, in January, 1912. That was a four-passenger car. Early in 1913, he bought a larger automobile. He also testified that he had driven up to the Mountain from Tacoma eight or nine times, as far as the Glacier. Just a month before the trial he took a couple of clients up there and back. (Trans., p. 52.) The reading of the Transcript will also show that he made various excursions to a great

many parts of the state. The evidence discloses that he had taken Mr. Murray for an automobile ride through the southwestern part of the state. (Trans., p. 62.) That he took one of his witnesses. Mr. Keagy, for a trip to the Mountain. One place on the road there was a sheer drop of several hundred feet from the edge of the road. (Trans., p. 63.) And Mrs. Henry testified about various automobile excursions, and the testimony at the time the court's remark was made, showed that plaintiff was in the habit of taking different members of his firm back and forth to their homes, morning and evening, in his automobile. And we further call the court's attention to the testimony of Mr. J. W. Roberts, who was a student conductor employed by the defendant at the time of the accident, but who was subsequently discharged by the company for shortage in fares. Mr. Roberts testified that the plaintiff came to see him after he was discharged; and further said that "plaintiff had told him something about a trip he was going to take around the world, that the doctors advised him to take. Plaintiff told him about a year ago that he had got his (plaintiff's) ticket for a trip around the world, and also had a lady nurse hired to go with him, but as plaintiff got sick or worse, it was impossible for him to go at that time, so he told the witness he had made up his mind to go now. Plaintiff had told him two or three weeks before the trial. Plaintiff told him that when the case was over he was thinking of taking his automobile and the witness and driving from

Tacoma to San Francisco, and taking the boat there. Plaintiff had asked the witness if he would go with him and witness told him he would. Plaintiff had then said he would write to the mother of the witness and ask her opinion about it. He did and she consented. Plaintiff had said from the time they left until they got back, the trip would last eight or ten months. Plaintiff was going to take his automobile on the boat." (Trans., pp. 89-90.)

The testimony offered by the plaintiff was of such a nature that it absolutely negatived any idea of anybody carrying plaintiff as an act of charity. The court furthermore, after addressing its remarks to counsel, instructed the jury that they were the sole and exclusive judges of the facts in every case from the evidence, giving the jury to understand that the remark was made not to influence them in any way in arriving at their conclusion as to the facts. After the remark complained of the court said to the jury. "You are the sole and exclusive judges of the facts in every case from the evidence." (Trans., p. 69.) And the court in its final instructions to the jury instructed them as follows:

"You are, in this case as in every other case where questions of fact are submitted to the jury for their determination, the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility of the witnesses." (Trans., p. 111.)

Plaintiff quotes at some length the case of *Peterson v. Pittsburg, etc., Mining Co.,* 140 Pac. 519, in support of his contention, but it will be noticed that although the remarks of the court in that case were of a more prejudicial character than those complained of in this case, the court refused to reverse the case for that reason, saying,—

"While it may be reasonable to assume that remarks of the trial judge, such as those camplained of in this case, may have an influence prejudicial to one or the other side of the case, yet, in view of the rule that the party who alleges error must establish the same clearly, we would not disturb the judgment in this case by reason of the errors assigned with reference to the remarks of the trial court. *McMahon v. Eau Claire*, 95 Wis. 640, 70 N. W. 829."

In the cases of *Cronkhite v. Dickerson*, 116 N. W. 371, and *Monier v. Phil. Rapid Trans. Co.*, 75 Atl. 1070, cited by plaintiff, no question of any reflection on an attorney tending to bring him in disrepute was involved, and in all cases cited by plaintiff the facts are so different as to be of little or no value in considering the matters complained of in this case.

In the action for damages evidence of the plaintiff's poverty is irrelevant, and it would have been reversible error for the court to have permitted the plaintiff to show that he was being carried as an act of charity, or would be soon so carried.

Pa. R. Co. v. Roy, 102 U. S. 451; 26 L. Ed. 141.

Alabama G. S. R. Co. v. Carrol, 84 Fed. 772.

National Biscuit Co. v. Nolan, 138 Fed. 6.

Dallas, etc., St. Ry. v. Summers, 106 S. W. 891.

Griser v. Schoenborn, 123 N. W. 823.

So. Ry. Co. v. Phillips, 71 S. E. 414.

Riverside & Dam River Cotton Mills Co. v. Carter, 74 S. E. 183.

Kelley v. Southern Wis. Ry. Co., 140 N. W. 60.

15 Cen. Dig., Damages, §498.

7 Dec. Dig., Damages, §171.

The Supreme Court of the State of Washington recently held in the case of *State v. Neis*, 74 Wash. 280, that where the remarks of the trial judge in ruling upon an offer of evidence were brought about by counsel's offer, which contained improper evidence, the party so offering the improper evidence could not object to the court's commenting upon the same.

It will be noticed that the offer of evidence followed the questions to which the court had sustained objections. There was no offer to prove anything in addition to what was indicated by the questions upon which the court had already ruled, except as the offer relates to the plaintiff as an object of charity. Nothing could be gained by plaintiff by making the offer except to suggest to the jury that Henry was an object of charity. The court had a right and it was its duty to confine counsel within proper limits and to prevent him

from persistently endeavoring to draw out evidence from the witness after the rulings of the court that the same was improper.

In Hein v. Mildebrandt, 115 N. W. 121, the court said,—

"Error is also assigned because of language used by the court in a colloquy between the court and counsel for appellant. The language complained of was an admonition coming from the court to the effect that after the court had ruled twice with reference to a certain question it was unprofessional and uncourteous for appellant's counsel to persist in putting the question for the purpose of procuring an answer considered improper by the court, and that counsel had the record covering the point completely, and that he must not offend in that way again. It appears from the record that counsel did persist in putting substantially the same question several times in succession after it had been ruled improper. Without prolonging the discussion upon this point, we think it clear that there was no prejudicial error in the language used under the circumstances, but, on the contrary, that the purpose of the court was to confine counsel within proper limits, and to prevent him from persistently endeavoring to draw out evidence from the witness after rulings of the court that the same was improper."

It would require a wide stretch of the imagination to see how the attorneys for plaintiff could have been brought into contempt before the jury by the remarks of the court. We submit that the language used in the case of *Press Pub. Co. v. Monteith*, 180 Fed. 356, is very applicable to this case.

"The defendant realizing apparently that even upon its own presentation no serious error has been committed, invokes the archaic rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is, that in order to justify a reversal the court must be able to conclude that the error is so substantial as to have injuriously affected the appellant's rights. Prejudice must be perceived, not presumed or imagined."

If any error was committed by the court — and we maintain none was committed — it was cured by the subsequent instructions of the court.

"The expression of an erroneous opinion by the court to counsel during the discussion, altho in the presence of the jury, except in rare cases of obvious prejudice, cannot be ground of reversal, when the conclusion finally reached and carried into effect, either by ruling or on evidence, or instruction to the jury, is correct. Gilchrist v. Brande, 15 N. W. 817; Stiles v. Neillsville Co., 58 N. W. 411; Baker v. State, 59 N. W. 570; Owen v. Long, 72 N. W. 364; Brown v. Warner, 93 N. W. 17."

McGowan v. City of Watertown, 110 N. W. 402.

An examination of the records in this case will disclose the fact that plaintiff was allowed the greatest latitude in the introduction of testimonly relative to plaintiff's physical condition, both before and after the accident complained of. The transcript of the evidence covers over 500 typewritten pages, and perhaps three-fourths of this amount concerns only the physical condition of the plaintiff, so that the jury were fully advised as to the

future ability of plaintiff to perform his usual duties, without resorting to speculation or conjecture.

#### VIII AND IX.

Under these specifications plaintiff maintained that the court erred in refusing to permit plaintiff to recall two witnesses for further cross-examination for the purpose of showing their interest in the result of the action. The transcript of record shows that on rebuttal plaintiff called the student conductor hereinabove referred to, J. Wesley Roberts, to testify in his behalf. Roberts is the student conductor to whom the plaintiff had offered an automobile trip around the world. Plaintiff did not introduce Roberts' testimony in his case in chief, but waited until defendant had introduced its testimony and then put on the student conductor as practically his last witness. This, we submit, was entirely out of order, but defendant raised no objection thereto. Plaintiff in his brief says that "Cross-examined by counsel for defendant this witness (Roberts) admitted that he had signed defendant's Exhibit 'G' preliminary to entering upon his employment with the defendant."

The record is absolutely silent as to what Exhibit "G" was. Plaintiff did not see fit to incorporate in his Bill of Exceptions any reference to this Exhibit "G" now complained of, and the defendant was deprived of any opportunity to make the purpose for which said Exhibit "G" was introduced apparent to the court. Defendant did not antici-

pate the use of this exhibit on any appeal of this case.

We respectfully call the court's attention to the Bill of Exceptions, including the testimony of the witness Roberts, as shown in the Transcript on pages 87-90, inclusive. If we might be permitted to go outside of the Transcript of Record, as the plaintiff has done, it would be shown by the Transcript of the Evidence that the witness Roberts had been discharged from the employment of the defendant Company, and that Mathieson, one of defendant's witnesses and the conductor in charge of the car, and who had also been discharged, at the solicitation of the plaintiff took the witness Roberts to plaintiff's office and plaintiff finally obtained his consent to testify as a witness for him. The Transcript of the Evidence would further show that on cross-examination Roberts denied having signed defendant's Exhibit "C," and denied that the signature attached thereto was his. Defendant then introduced several papers signed by the witness Roberts at the time he entered defendant's employment, including Exhibit "G," to show his signature only, and after the introduction of those exhibits Roberts admitted having signed Exhibit "C," which was his statement of the manner in which the accident occurred, and directly controverting his sworn evidence.

At the very close of the case plaintiff put Mr. Mathieson on the stand for the purpose of asking him whether he had ever signed an agreement sim-

ilar to Exhibit "G." The court did not permit this, holding that this was not rebuttal.

We respectfully submit to the court that the ruling was correct. Exhibit "G" was no part of defendant's case, but was merely introduced for the purpose of impeaching the testimony of the witness Roberts as to his signature on Exhibit "C." It was absolutely within the discretion of the court to refuse to permit plaintiff to further cross-examine the witnesses Mathieson and Olson in this regard, and the court did not abuse its discretion in that respect, especially in view of the fact that plaintiff failed and neglected to introduce the testimony of Roberts in his case in chief.

We maintain that, even though the two witnesses had signed such an agreement, it did not change their legal liability to the company for damages resulting from their negligence as servants and employes of the defendant, the rule of law being that the employe is liable to his employer for damages resulting to the employer from the employe's negligence in performing his work.

National Savings Bank of the District of Columbia vs. Ward, 100 U. S. 195; 25 L. Ed. 621.

Mobile & Montgomery Ry. Co. vs. Clanton, 31 Am. Rep. 15.

Navarre Hotel & I Co. vs. American Appraisal Co., 142 N. Y. S. 89.

Beard v. Horton, 5 Southern 207.

Willard v. Pinard, 44 Vt. 34.

Gilson v. Collins, 66 Ill. 136.

Century, Master & Servant, §74.

We wish to call the court's attention particularly to the instruction given by the court to the jury as follows:

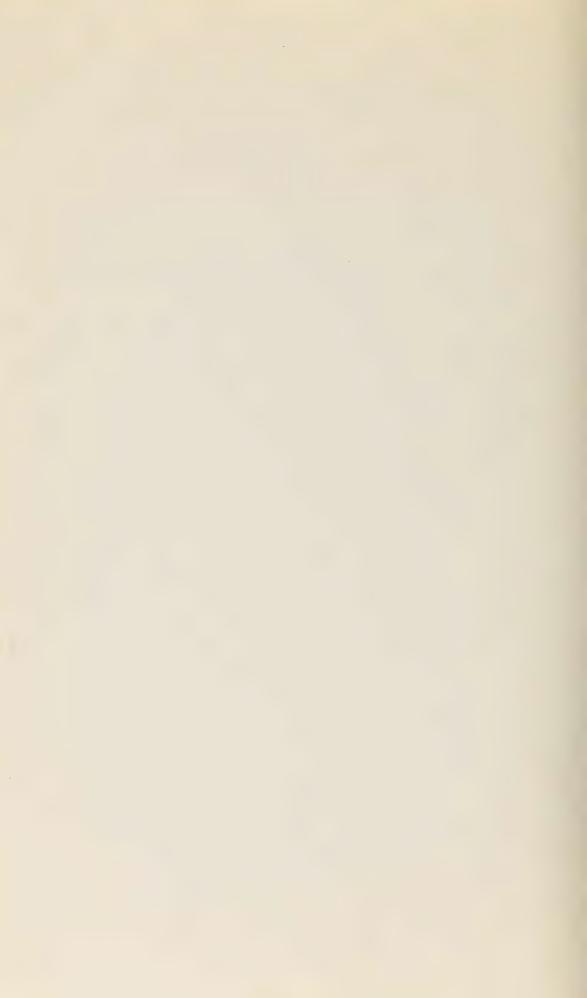
"If you conclude that the defendant's servants who were in charge of the car may have had an interest, by reason of their relation to this accident, in the case, you should give weight to this in passing upon their credibility."

The court will furthermore find that the Transcript shows that Mathieson, who was discharged from the employment of the company, had done all in his power to assist plaintiff in obtaining the names of the witnesses that defendant had to the accident, and plaintiff did not contend in his complaint or during the trial that motorman Olson was guilty of any negligence toward defendant.

We, therefore, submit that the court did not abuse the sound discretion necessarily lodged in it in refusing to permit plaintiff to further interrogate Mr. Mathieson, and the record shows conclusively that Mr. Olson was never put upon the witness stand to testify, but plaintiff merely made the statement that he expected to put him on, which under all rules of evidence is insufficient upon which to predicate error.

No error was committed in the trial of the case as complained of by plaintiff, and we therefore request the court to affirm the judgment.

J. A. SHACKLEFORD, F. D. OAKLEY.



# In the United States Circuit Court of Appeals

For The Ninth Circuit

M. G. HENRY,

Plaintiff in Error,

VS.

TACOMA RAILWAY & POWER COM-PANY, a corporation,

Defendant in Error.

No. 2453.

## PETITION FOR RE-HEARING

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# In the United States Circuit Court of Appeals

For The Ninth Circuit

M. G. HENRY,

Plaintiff in Error,

VS.

TACOMA RAILWAY & POWER COM
No. 2453. PANY, a corporation,

Defendant in Error.

### PETITION FOR RE-HEARING

The defendant in error respectfully petitions the court for a rehearing of the above entitled action, and bases its petition for rehearing upon the following grounds:

T.

It was within the discretion of the trial court to refuse to permit the plaintiff in error to recall the witness Matthieson for cross-examination, and the exercise of that discretion is not subject to review in this court.

#### II.

That the refusal of the court to permit the recross-examination of the witness Matthieson, if it was error, was harmless error, because the facts sought to be established by the proposed re-crossexamination were fully established by other evidence.

In the opinion the ground of reversal is stated as follows:

"The action of the court in refusing to allow plaintiff in the case to show that the witness Matthieson had a direct interest in the result of the trial was duly assigned for error and constitutes such error as requires the reversal of the judgment."

The assignment of error is as follows:

"That said district court erred in refusing to permit the witness Martin Matthieson to answer the following question, viz.: 'I show you the defendant's exhibit G, being in the form of an agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that.'"

It will be noted that the question requires an expression by the witness of his opinion as to whether the paper he signed, if he signed any, was similar to the paper signed by Roberts. If any contract had been entered into by Matthieson in

writing, it would be the best evidence. The question was a double one, inquiring as to whether the defendant had entered into a contract and also inquiring as to the contents of the writing in regard to whether it was similar to another contract.

There was no offer to indicate what the answer to the question would be. There is nothing to indicate that it is more probable that the witness would have answered "No" than that his answer would have been "Yes."

This is not a case where at the time the witness was on the stand a proper question was asked him as to whether he had entered into any agreement in regard to liability to the company for his negligence, and where the court held the inquiry to be improper. This is a case where the proper time for taking up an inquiry of this kind had passed, and the examination of the witness had been closed. The evidence of the defense had been put in and the only legal right of the plaintiff remaining was the right to introduce his rebuttal testimony.

Section 861 of the Revised Stat. of the U.S.. provides that "the mode of proof in the trial of actions at common law shall be by oral testimony, and by examination of witnesses in open court, except as hereinafter provided."

Section 721 provides that, except as otherwise provided, the laws of the several states "shall be

regarded as the rules of decision in trials at common law."

The last mentioned section has been held to apply to rules of evidence prescribed by the laws of the State in which the Federal court was sitting.

Parker vs. Moore, 111 Fed. 470.

The laws of the state relating to evidence, means not only the statutes of the state, but also the decisions of its highest courts respecting rules of evidence.

Nashua Savings Bank vs. Anglo-American Land Co., 189 U. S. 228, 47 L. Ed. 782.

Section 339 B. & R. Codes & Stats. of Washington provides the manner in which a trial shall proceed after a jury is sworn. The first clause of the section relates to opening statements, then follows this provision:

"The plaintiff, or the party upon whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party will then produce his evidence; the parties will then be confined to rebutting evidence, unless the court shall consider that justice requires that evidence in the original case may then be offered."

The opinion of this court virtually holds that the trial court does not have the power after the evidence of the plaintiff is in and after the evidence of the defendant is in, to confine the further testimony of the plaintiff to matters of rebuttal. In effect, it is held that an adherence to the well established rules in regard to the order of proof constitutes such an abuse of discretion as to require a reversal of the case. It is conceded that the evidence offered was not rebuttal (Record, p. 91).

The evidence rejected in this case was not evidence that was relevant or material to any issue raised in the case. It merely related to the collateral question of the interest of the witness. We submit that the rule is the same that governs cross-examination for the purpose of testing the knowledge of a witness.

See Wabash Screen Door Co. vs. Lewis, 184 Fed. 260, where the question ruled out was put for the purpose of testing the knowledge of the witness, and it was held that the error, if any, was not prejudicial.

Any matter affecting the credibility of a witness has always been a matter peculiarly for the trial court. The courts, where questions of credibility have been passed on by the jury or by the judge without a jury, almost uniformly have refused to review any question in regard to credibility.

It has been universally regarded that the scope of cross-examination, that the matter of the recalling of witnesses for further examination, and that the reopening of a case after defendant's evidence is in, for purposes other than rebuttal testimony, are matters peculiarly within the discretion of the trial court.

In Johnson vs. Jones, 1 Black 209, L. Ed. p. 122, there was in review the ruling of the court in excluding evidence tending to affect the credibility of one of the defendant's witnesses. The court says:

"We estimate at its highest value the power of cross-examination. The extent to which it may be carried, touching the merits of the case, was defined by this court in *Phil. & Trenton R. R. Co. vs. Simpson*, 14 Pet. 448. The rule there laid down, this court has since adhered to. A cross-examination for other purposes must necessarily be guided and limited by the discretion of the court trying the cause. The exercise of this discretion by a circuit court cannot be made the subject of review by this court. We have looked through the long and searching cross-examination to which this witness was subjected. There would have been no error if the objection had been overruled. There was none in sustaining it."

In *Davis vs. Coblens*, 174 U. S. 719, 43 L. Ed. 1147, it is said:

"Walter was called as a witness by plaintiff; testified that such reconveyance was the only one he had made of lot 10, the lot in controversy. Thereupon, defendant's counsel cross-examined him at great length, against the objection of plaintiffs, regarding his business of buying and selling real estate and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiff's counsel was a general one and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it

extended to matters not connected with the examination-in-chief. In Rea vs. Missouri, 17 Wall 532 (21:707), it was said: 'When the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion and the exercise of that discretion is not reviewable on a writ of error.'"

In Frost vs. U. S., 163 U. S. 452, L. Ed. 225, it is said:

"The fourth assignment complains of the refusal of the trial court to permit a witness who had been examined and cross-examined to be recalled in order to make some change in the statements made by him on cross-examination. This was plainly a matter within the discretion of the court below."

In Seymour vs. McDonald Lbr. Co., (Cir. Crt. of Appls. 6th Cir.) 58 Fed. 957-960, it is said:

"The rule has long been settled that the crossexamination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters, he must do so by calling the witness to the stand in the subsequent progress of the case. Houghton vs. Jones, 1 Wall 706; Railroad Co. vs. Stimpson, 14 Pet. 461; Willis vs. Russell, 100 U.S. 621, 625. In the case last cited it was further held that a judgment will not be reversed merely because it appears that the rule limiting the crossexamination to the matters opened by the examination-in-chief was applied and enforced. The course and extent of cross-examination, when directed to matters not inquired about in the principal examination, is very largely subject to the control of the court, in the exercise of a sound discretion which is not reviewable on a writ of error. Rea vs. Missouri, 17 Wall 542; Johnston vs. Jones, 1 Black 216."

In *Hart vs. U. S.*, 84 Fed. 799, the court held as stated in the syllabus, that "the refusal of the trial judge, after the evidence on both sides had been closed, to permit defendant to examine another witness is a matter of discretion and not reviewable."

In Union Pacific Ry. et al. vs. Chicago, R. I. & P. Ry. Co., 51 Fed. 328, the following language is used:

"After the testimony had been closed, and at the final argument, the defendants moved the court to permit the introduction of the evidence on which alone this contention is based. The complainant objected on the grounds that the testimony had been closed, no good reason was shown for its introduction at that time, it was incompetent, irrelevant and immaterial. The court overruled the motion, sustained complainant's objections, and defendants excepted. It was discretionary with the court below to grant or refuse the motion. To refuse it was certainly no abuse of this discretion, and we do not feel authorized to consider this rejected evidence, or the argument based upon it. Without the rejected evidence, the record proved this contract to be within the powers of the Rock Island Ry. Company."

We direct the court's attention to the case of Resurrection Gold Mining Company vs. Fortune Gold Mining Company, 129 Fed. 668, and particularly to the concurring opinion written by Judge Hook, where the right of a circuit court of appeals to review matters peculiarly within the jurisdic-

tion of the trial judge is considered at considerable length and many cases from the U. S. Supreme Court and federal cases are quoted from and referred to. The court holds in the above case that the discretion of the trial court exercised in admitting or rejecting is not subject to review.

Wignore, in his work on Evidence, Vol. 3, says in section 1899:

"Recall for Re-cross-examination. A recall for re-cross-examination will ordinarily be unnecessary, except in rare cases where the direct examination of an intervening witness has brought out new facts upon which the prior witness may throw light, and for this purpose the matter can always be left in the hands of the trial court. The general principle, therefore, of the trial court's discretion as controlling the grant of a recall for this purpose (§1898) is conceded to apply here also. The only exception possibly is that of a recall to put the warning question essential to lay a foundation for impeaching by proof of a prior self-contradictory assertion; here it is sometimes held that the recall is a matter of right."

In Section 1898, Wigmore says, in reference to recall for re-direct examination, "accordingly, while it does not seem to be maintained that there are cases in which a recall may be demanded as of right, it is conceded that the allowance of a recall, upon the general principle, rests entirely with the Court's discretion."

We wish to call the court's attention to the fact that exhibit G was used only for the purpose of proving the signature of the witness who had

denied making a statement in writing to the defendant company, and was used for no other purpose. The plaintiff in the case, for some reason or other did not put on this witness to prove his main case, but used him solely for rebuttal. The evidence he introduced was not in rebuttal, but was direct evidence in support of his case in chief and he was permitted to testify only in the discretion of the trial judge. At the very close of the case they sought to recall one of defendant's witnesses to show whether or not he had signed a form similar to exhibit G. It is admitted that it was not in rebuttal, and it must be conceded by the court that it was not in cross-examination of anything brought out by the witness Matthieson in his direct examination.

If there is anything that can be left to the discretion of a trial court, we submit that in this particular instance the discretion of the trial court was rightfully exercised and is not subject to review by this court. This principle, we maintain, is so fully supported by the authorities that we do not consider it necessary to cite the great multitude of cases on this point which have been decided in the courts of last resort of the various states.

We believe that it has been universally held that error in excluding evidence as to a certain fact is harmless where the fact was fully established by other evidence.

See Dec. Dig. Appeal and Error, Sec. 1057, where over 100 cases are cited.

The fact sought to be shown by the testimony was that Matthieson had a direct interest in the result of the trial, because he was bound to reimburse the defendant company for any loss occasioned to it by his negligence. There was no dispute that Matthieson was in the employ of the company at the time of the accident as a conductor. Liability of Matthieson to respond to the company for loss occasioned by his negligence necessarily existed by reason of his employment. This interest existed whether he had or had not signed an agreement similar to Exhibit "G."

If the defendant in error is right in its contention as to the law in regard to this interest existing independent of Exhibit "G," the case comes clearly within the line of cases holding that error is harmless where it consists in rejecting evidence showing a fact, where such fact is already shown.

In addition to the cases cited on page 14 of the brief of defendant in error, we request the attention of the court to the following addditional cases:

In Georgia & S. F. Ry. Co. v. Jossey (Ga.), 31 S. E. 179, in holding that the railroad company was entitled to recover from a baggage man in its employ the loss sustained by the company in consequence of a trunk being stolen, the court says:

"The principal, the railroad company, having been required on account of the negligent conduct of the baggage master, and his agent, to indemnify the passenger against loss on account of the theft of the baggage, was entitled to reimbursement at the hands of the baggage master for the amount which it had paid out. Judge Story, in his work on Agency, in dealing with this subject, says: 'Wherever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority or by positive misconduct, or by mere negligence, or by omission in the proper functions of his agency, or in any other manner, and any loss or damage falls on his principal, he is responsible therefor, and bound to make a full indemnity. In such cases it is wholly immaterial whether the loss or damage be direct to the property of the principal, or whether it arise from the compensation or reparation which he has been obliged to make to third persons in discharge of his liability to them for the acts or omissions of his agent. The loss or damage need not be directly or immediately caused by the act which is done or is omitted to be done. It will be sufficient if it is fairly attributable to it as a natural result of a just consequence."

In *Doremus v. Root*, 23 Wash. 715, the court says:

"For injuries caused by the negligent act of an employe not directed or ratified by the employer, the employe is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondent superior— the rule of law which holds the master responsible for the negligent act of his servant committed while the servant is acting within the general scope of his employment and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employe, and when the employer is compelled to answer in damages therefor he can recover over against the employe. Oceanic Steamer Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461 (31 N. E. 987, 30 Am. St. Rep. 685); note to Village of Carterville v. Cook,

16 Am. St. Rep. 248; Shearman & Redfield, Negligence (5th Ed., §242); 2 Van Fleet, Former Adjudication, p. 1162."

See, also,

Phoenix Bridge Co. v. Creebe, 92 N. Y. S. 855, affirmed in 78 N. E. 1110.

Costa v. Yoachim (La.), 28 So. 992.

Glove v. Richardson, 64 Wash. 403.

Central of Georgia Ry. Co. v. Macon (Ga.), 71 S. E. 1078.

Late v. Fenn, 120 N. Y. S. 237-244.

Kampmann v. Rothwell (Texas), 109 S. W. 1089.

Scott v. Custer (N. Y.), 88 N. E. 794.

We have found no cases which support the contention that the master cannot, without an express agreement, recover from his servant for loss occasioned by the negligence of the servant.

The new equity rule No. 46 provides that whenever evidence is offered and excluded and exception is made to the ruling, the court shall report so much thereof or make such a statement respecting it as will clearly show the character of the evidence, and the form in which it was offered.

The rule then provides "if the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree, unless it be clearly of the opinion that material prejudice will result from an affirmance, in which event

it shall direct such further steps as justice may require."

We submit that the rule in regard to presumption of prejudice ought not to be greater in cases where an appeal is made to the discretion of the court than in cases where the parties to an equity proceeding at the proper time, in the proper order, offer proof which is rejected by the court. Would the court be willing to say that it is clearly of the opinion that the verdict would have been different if the question asked the witness had received an affirmative answer?

For the reasons stated, the defendant in error requests a rehearing. The defendant in error contends that the rule laid down in this case of interfering on appeal in matters of recalling of witnesses, scope of cross-examination, and opening up questions other than questions of rebuttal after defendant has put in its evidence, is not in accordance with the existing rules in other circuits. Because of the gravity and importance of the matter of a court of appeals undertaking to regulate matters which defendant in error contends are matters exclusively within the jurisdiction of the trial court, and in the interest of uniformity of decision, the defendant in error, in the event this petition for rehearing is overruled, requests the court to stay the remittitur in this case for such reasonable length of time as to the court may seem proper, in order to allow the defendant in error an opportunity to apply for a writ of certiorari to the Supreme Court of the United States, and the defendant in error suggests that the period of such stay shall be at least 90 days.

Respectfully submitted,

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F. D. OAKLEY.

I. F. D. Oakley, counsel for the defendant in error in the above cause, do hereby certify that the foregoing petition for rehearing in my opinion is well founded in law, and that it is not interposed for delay.

Attorney for Defendant in Error.

7. H Clapby









